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Harvey Walker
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MUNICIPAL ORDINANCE MAKING

FEDERAL LIMITATIONS UPON MUNICIPAL ORDINANCE MAKING POWER

By

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INTRODUCTION

There appears to be a desire among those charged with the responsibility of governing local communities for more adequate and convenient information on ordinance making. While there are two comprehensive treatises on the "Law of Municipal Corporations,"[1] they are usually not found in the law offices and libraries of the smaller cities. Even where they are available, their organization and scope make them difficult to use in the preparation of municipal ordinances. Two sets of facts should be made available for every municipal ordinance draftsman. One of these should be a statement of the law of his own state affecting ordinance making, and the other should be a summary of the constitutional rules laid down by the United States Supreme Court, and applicable in every state. This volume is an attempt to provide the facts of the second type. The work of preparing the needed data for each of the forty-eight states will no doubt proceed slowly, depending for its impetus upon the strength of local demand and the interest of scholars in each jurisdiction.

The problem of municipal ordinance making may be approached from any one of several points of view. One might consider it as a social process. Such an approach would involve an inquiry into the genesis of political action and an analysis and evaluation of the social processes which normally culminate in the enactment of law. A second mode of approach would be to consider it as a problem of administration. This would require an investigation of the field of administrative law, a study of the methods of enforcement, and an evaluation of the relative efficiency of the various methods employed. Having in mind the need of municipal officials, however, the approach which has been chosen for the present study is that of a definition of legal limitations.

In the drafting of a municipal ordinance, the draftsman is interested in producing a rule which will stand the test of legal scrutiny. With this in mind it appears desirable that the limitations upon the ordinance-making process should be defined in order that municipal officials may learn the scope of their authority. These limitations are

[1] Dillon, John F., *Commentaries on the Law of Municipal Corporations*, 5 vol. Boston, 1911 (5th ed.). McQuillin, Eugene F., *Treatise on the Law of Municipal Corporations*, 8 vol. Chicago, 1911.

both state and federal in character. As the rules laid down in state law vary with each state jurisdiction, this work has been confined to a consideration of the questions which arise out of conflicts between municipal ordinances and the Federal Constitution, laws, and treaties.

All of the opinions of the United States Supreme Court, since its formation in 1789, that in any way deal with the validity of municipal ordinances have been examined, and will form the basis for the discussion which follows. Although some of the questions which will be discussed have been dealt with in state courts as well as in the lower federal courts, in most instances only the decisions of the United States Supreme Court will be cited. Readers of this work are referred to the principal treatises on the law of municipal corporations for citations to the decisions of state courts and the lower federal courts. At appropriate places in this work footnote references are made to these treatises.

This monograph was suggested by contacts with hundreds of municipal officials in the Middle West. For encouragement and many helpful suggestions in its preparation, the author is deeply indebted to Professor William Anderson and Professor Harold F. Kumm of the University of Minnesota. He wishes also to express his appreciation for the advice and assistance of Professor Francis W. Coker of the Ohio State University in preparing the work for publication.

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Chapter I

THE PLACE OF MUNICIPAL ORDINANCES IN OUR LEGAL SYSTEM

1. The Hierarchy of Law

The Constitution of the United States provides in Article VI, Clause 2, that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." As will be seen, this clause recognizes the existence of five types of law under our federal system: (1) The Constitution of the United States, (2) laws of the United States (acts of Congress) which shall be made in pursuance thereof, (3) all treaties made, or which shall be made under the authority of the United States, (4) state constitutions, and (5) state laws. These types of law are by this clause given precedence in the order in which they are named, with the exception that acts of Congress and treaties are recognized as being on a parity to such an extent that the latest pronouncement, whether law or treaty, will prevail.[1] No type or grade of law may conflict with any valid act of a higher type or grade.

In considering questions of constitutional law under the Constitution of the United States, the Supreme Court usually reduces the act under review in each case to one of the grades of law mentioned in the constitution.[2] Other types of law may, however, be distinguished: (1) executive rules or orders, sometimes called ordinances, (2) the common law, and (3) municipal ordinances.

Executive rules or orders are found in both Federal and state governments. They may be issued only by authority of constitution or

[1] Whitney *v.* Robertson (1888) 124 U. S. 190, 194; 31 L. ed. 386.

[2] Where incidental to some constitutional question, the common law is sometimes recognized and applied. "Where private rights are to be determined by the application of common law rules alone, this court although entertaining for the state tribunals the highest respect, does not feel bound by their decisions." City of Chicago *v.* Robbins (1863) 2 Black 418; 17 L. ed. 298.

statute[3] and hence are subordinate to the laws authorizing their issuance. They may be promulgated either by the chief executive or by other principal executive officers, or by administrative officers, boards, or commissions. When made strictly in accordance with authority, such rules stand on a parity with statutes so far as an obligation to obey them is imposed upon the public, even though the effect of disobedience may lead to different results in the respective cases.

The common law consists of those judicial precedents which the courts will apply in the absence of a statutory or constitutional rule. Due to the mutual exclusiveness of the jurisdiction of the highest courts in the several states and varying degrees of modification by statute of common law rules, differences have arisen which have led to the development of a somewhat distinctive common law in each state, although all of the states, except Lousiana, originally accepted as a basis the common law of England.[4] The basis in Louisiana is the Napoleonic Code. In applying the common law to cases before it, the United States Supreme court is inclined to a use of the common law of the state where the case arose, if that can be ascertained from an examination of the cases decided by the highest state court.[5]

Municipal ordinances are a subordinate form of legislation enacted by the governing bodies of municipal corporations under authority of the state law or a charter framed and adopted under provisions of the state constitution.[6] When arranged in order of priority, municipal ordinances stand at the foot of the list of legislation recognized in our legal system, except for executive or administrative rules or orders made under ordinance authority.

The hierarchy of law in the United States therefore may be outlined as follows in the order of precedence of application:

1. The Constitution of the United States.
2. Acts of Congress and treaties.
3. National executive rules and orders.
4. State constitutions.
5. State statutes.

[3] Army and navy rules and regulations issued by the President of the United States under his constitutional authority as commander-in-chief of the army and navy are exceptions to the rule requiring statutory authorization.

[4] See Bouvier's *Law Dictionary* (3rd Revision) 1914, vol. I, pp. 564-568.

[5] Lorman *v.* Clarke, 2 McLean 568.

[6] Dillon, J. F., *op. cit.*, vol. II, p. 892, sec. 570; McQuillin, E., *op. cit.*, vol. II, p. 1390, sec. 632.

6. The common law of the state.
7. State executive rules and orders.[7]
8. Municipal ordinances.

The laws of each grade in this hierarchy must conform to all applicable provisions of laws of every higher grade. Municipal ordinances, standing at the bottom of the list, must, therefore, stand the test of conformity to all other grades of law so far as any rules established by them are applicable. Thus it can easily be seen that the draftsman of municipal ordinances must possess a wider knowledge and skill in his task than the draftsman of state or national legislation. The field over which his knowledge should range is the entire domain of law.

The approach employed in this work is to consider the rules of the higher grades of law applicable to municipal ordinance-making as limitations upon the scope of the ordinance power. While only the federal questions are to be considered here, a similar study of state questions in each state should prove helpful to the ordinance draftsman in his highly technical task of drafting valid municipal legislation.

2. The Nature of a Municipal Corporation

A corporation is a legal group-person having an existence distinct from the individuals which compose it.[8] The ordinary corporation is a voluntary association of individuals for some common object which is

[7] The relative position of state executive rules and orders and the common law in respect to priority of application is not entirely clear. But as this question is not vital to the purposes of this study, it will be dismissed with the suggestion that anyone desiring to determine this matter make a careful examination of the decisions of the state supreme court of the state in which he is interested.

[8] Dillon, J. F., *op. cit.*, vol. I, p. 57, secs. 30-32; McQuillin, E., *op. cit.*, vol. I, p. 245, sec. 103.

In an attempt to enforce the payment of certain railroad bonds, the holder found himself without a remedy through mandamus against the officers of the corporation. He applied to the federal courts for the levy of a tax directly by the court. This was denied, so he asked that judgment be given against property belonging to any one inhabitant of the city, leaving the citizens to settle the equities among themselves. The Supreme Court denied this also, holding that the inhabitants were not joint and several debtors with the corporation. Such a proceeding, said the court, would obviously deprive the citizens of their property without due process of law. Rees *v.* Watertown (1874) 19 Wall. 107; 22 L. ed. 72.

But the federal courts will levy a tax, to be collected by the U. S. Marshal, when such procedure is sanctioned for collection of debts in cases before the state courts. Lee County *v.* U. S. ex. rel. Rogers (1869) 7 Wall. 175; 19 L. ed. 162.

In Morgan *v.* Town of Beloit a judgment of the circuit court dismissing a bill against certain leading citizens of the town as its representatives for the amount of a judgment against the town which could not be collected because of the resignation of the town officers was affirmed by an equal division of the court. (1870) 19 L. ed. 508.

specified in the articles of incorporation. The existence of the corporation may be perpetual or for a term of years. In any event, its existence is distinct from that of its members, and though its membership may entirely change during its life it is in no way affected thereby.

This concept of corporateness as applied to municipalities was known to the Roman law. In the Roman Empire the colonial and conquered cities were considered to have a corporate existence.[9] During the Dark Ages the barbarian invaders were unappreciative of the refinements and abstract concepts of the Roman law, and the idea of municipal corporateness fell into disuse; but the idea of corporateness was preserved in the churches and universities. The cities fell under the control of the feudal nobles and medieval kings, who used them chiefly as sources of revenue to finance their incessant warfare. Gradually, however, the cities revolted against this system and by purchase or violence won their independence and charters of liberties and privileges from the sovereign.

Those early grants of privileges were not charters in the modern sense, but were merely a recognition by the king or feudal overlord of certain customs of the locality, which were guaranteed against interference. These charters were considered as personal grants, hence were renewed by each king or overlord. It was not until 1100 that the City of London was recognized as a distinct legal entity in a charter granted to it by Henry I. But even this precedent was not followed widely in granting charters until the fifteenth century.[10] The early charters gave privileges to the freemen of the town as individuals and not in any corporate capacity. Later these privileges in many cases came to be vested in a small group in which vacancies were filled by a system of cooptation. This caused the so-called close corporations, which became the models for several of the earliest American charters.

By the time of the settlement of America, the concept of municipal corporateness had become firmly established in England. The system of borough government then in use in England was transplanted to this country with other political institutions to which the colonists were

[9] Dillon, J. F., *op. cit.*, vol. I, p. 3, sec. 3; McQuillin, E., *op. cit.*, vol. I, p. 64, sec. 31.

[10] See McQuillin, E., *op. cit.*, vol. I, p. 103, secs. 49-56. "It has been common to reckon a charter granted in 1439 by Henry VI to the men of Hull as the first definite instance of municipal incorporation . . . (but) the corporateness of the old boroughs was not manufactured, but grew and is perceptibly older than the charter for Hull." Maitland, F. W., *Township and Borough*, pp. 18-20.

accustomed. The first important charter was that granted to New York in the name of James II by Governor Dongan in 1686 under instructions from the Duke of York.[11] In all, about twenty charters were granted during the colonial period — all between 1686 and 1746. All of these were given by the governors under orders from the king or proprietor — never by the colonial assembly. In no case was a charter granted except on request of the local citizens or officers. In a few cases the charters were submitted to the inhabitants for their acceptance or rejection.

The granting of charters in England, at the time of the American Revolution, was a matter of royal prerogative. The first state legislatures became the legal successors not only to all powers customarily exercised by Parliament but to all royal prerogatives as well. Thus we had in this country a system of legislative control of municipal charter grants nearly sixty years before the Municipal Corporations Act of 1835, although Parliament had been creating local authorities for special purposes at intervals since the beginning of the eighteenth century.[12]

Since 1776, then, the state legislatures, as legal successors of the prerogative of the crown, have assumed the power to create and regulate municipal corporations. A power to create corporations was not granted to the Federal Government except as an incident to the powers expressly granted and hence is retained by the states under the reservations of the Tenth Amendment.

The implied powers of the Federal Government have been held to authorize the creation by Congress of municipal corporations in the District of Columbia[13] and, directly or through territorial assemblies, in the territories and possessions.[14] The states, however, have complete and absolute power to create, alter and abolish municipal corporations

[11] Anon., *The Charter of the City of New York*, 1836.

[12] Spencer, F. H., *Municipal Origins* (Period from 1740-1835) London, 1911.

Webb, Sidney and Webb, Beatrice, *English Local Government*, vol. IV, "Statutory Authorities for Special Purposes," London, 1922.

[13] For cases explaining the legal character of the District of Columbia see: Barnes *v.* District of Columbia (1876) 91 U. S. 540; 23 L. ed. 440; Stoutenburgh *v.* Hennick (1889) 129 U. S. 141; 32 L. ed. 637; Metropolitan Railroad Co. *v.* District of Columbia (1889) 132 U. S. 1; 33 L. ed. 231; Smith *v.* Corporation of Washington (1857) 20 How. 135; 15 L. ed. 858; Weightman *v.* Washington (1862) 1 Black 39; 17 L. ed. 52; Loughboro *v.* Blake (1820) 5 Wheat. 317; 5 L. ed. 98.

[14] Dillon, J. F., *op. cit.*, vol. I, p. 91, sec. 57.

For a case upholding power of territorial legislature to incorporate a city see Rogers *v.* City of Burlington (1866) 3 Wall. 654; 18 L. ed. 79.

For a case concerning power of federal military officers when occupying a city in

within their territorial jurisdiction.[15] This power is customarily exercised through the state legislature, for the granting of charters is recognized to be a legislative power which, in the absence of a special rule, must be exercised by the legislature under our doctrine of the separation of powers.[16]

By a long line of decisions the United States Supreme Court has held that municipal corporations are mere agents of the state legislature, created by it to aid it in the administration of the state's business. State courts recognize a dual capacity in municipal corporations: (1) to act as agents of the state in carrying on state functions within their territorial jurisdiction, and (2) to act as an agency for the satisfaction of local needs. But the Supreme Court, although recognizing this concept as a useful one in state law, disregards it and considers municipalities as mere administrative areas when it is engaged in federal constitutional inquiry.[17]

scene of military operations to make contracts as to municipal subjects which will bind the municipality upon the resumption of civil government, see City of New Orleans *v.* New York Mail Steamship Co. (1874) 20 Wall. 387; 22 L. ed. 354.

Right of city officers appointed by president under military rule to removal of suit against them from state to federal courts upheld in Mayor etc. of Nashville *v.* Cooper (1868) 6 Wall. 247; 18 L. ed. 851.

[15] Dillon, J. F., *op. cit.*, vol. I, p. 92, sec. 58; McQuillin, E., *op. cit.*, vol. I, p. 294, sec. 121.

Debts may be imposed upon a municipal corporation by the legislature without its consent. Jefferson City Gas Light Co. *v.* Clark et al. (1877) 95 U. S. 644; 24 L. ed. 521. City of Quincy *v.* Cooke (1883) 107 U. S. 549; 27 L. ed. 549.

The grant of a new charter by the legislature does not in any way affect the power of the corporation to take, hold and administer a trust held under the former charter. Girard *v.* City of Philadelphia (1869) 7 Wall. 1; 19 L. ed. 53.

The extinguishment of a valid contract by annexation of the municipality to another city will not be presumed. Long Island Water Supply Company *v.* City of Brooklyn (1897) 166 U. S. 685; 41 L. ed. 1165.

[16] See McQuillin, E., *op. cit.*, vol. I, p. 325, sec. 136.

Several states have provided by constitutional amendment that cities may frame and adopt their own charters. For a comment on this practice in which the Supreme Court calls the City of St. Louis an "imperium in imperio" see City of St. Louis *v.* Western Union Telegraph Co. (1893) 149 U. S. 465; 37 L. ed. 810.

[17] Examples include: Town of East Hartford *v.* Hartford Bridge Co. (1850) 10 How. 511; 13 L. ed. 518; Rogers *v.* City of Burlington (1866) 3 Wall. 654; 18 L. ed. 79; United States *v.* Baltimore & Ohio Ry. Co. (1873) 17 Wall. 322; 21 L. ed. 597; Nashville *v.* Ray (1874) 19 Wall. 468; 22 L. ed. 164; Maryland *v.* Baltimore & Ohio Ry. Co. (1845) 3 How. 534; 11 L. ed. 174; Weightman *v.* Washington (1862) 1 Black 39; 17 L. ed. 52; Chicago B. & Q. Ry. *v.* County of Otoe (1873) 16 Wall. 667; 21 L. ed. 375. See also Chapter III post.

For a discussion of the dual nature of municipal corporations under state law see: Walla Walla *v.* Walla Walla Water Co. (1898) 172 U. S. 1; 43 L. ed. 341; City of Trenton *v.* State of New Jersey (1923) 262 U. S. 182; 67 L. ed. 937.

In one case, at least, the Supreme Court does admit and apply the doctrine of dual capacity; see City of Los Angeles *v.* Los Angeles G. & E. Corp. (1919) 251 U. S. 32; 64 L. ed. 121.

Municipal and Federal Governments touch each other at many points and in some instances conflicts have occurred. These conflicts are resolved by the federal courts according to the same rules as those adopted for the determination of controverted questions between state and Federal Governments.[18]

[18] Cases involving relations of cities and Federal Government: Power of city to tax United States stock for city purposes denied on authority of McCulloch *v.* Maryland in Weston *v.* City of Charleston (1829) 2 Pet. 449; 7 L. ed. 481. Same as to bank capital invested in United States treasury notes—People ex rel. Bank of New York *v.* County of New York (1869) 7 Wall. 26; 19 L. ed. 60.

Same as to U. S. certificates of indebtedness—Peo. ex rel. Bank of New York *v.* Connelly (1869) 7 Wall. 16; 19 L. ed. 57.

But a U. S. court sitting in equity will not restrain the levy of a tax upon U. S. notes where the owner had withdrawn a large bank balance on the day before the valuation of property for taxation and had requested and received U. S. notes with intent to evade state taxation. Mitchell *v.* Bd. of Comrs. (1876) 91 U. S. 206; 23 L. ed. 302.

When a corporation for a Federal purpose sells land under an Act of Congress requiring that even after warranty deeds are executed, the government shall retain a first lien for any unpaid balance of the purchase price, no tax levied by a municipal corporation may constitute a lien prior to the government's interest. City of Brunswick *v.* U. S. and U. S. Housing Corporation (1928) 276 U. S. 547; 48 Sup. Ct. Rep. 371; 72 L. ed. 693.

Power of city to open streets through a United States military reservation denied in United States *v.* City of Chicago (1849) 7 How. 185; 12 L. ed. 660. In this case the court said, "Though this court possesses a strong disposition to sustain the rights of the states and local authorities claiming under them, when clearly not ceded, or when clearly reserved, yet it is equally our duty to support the general government in the exercise of all which is plainly granted to it."

While as a general rule the Federal Government will not levy or collect taxes upon the property of a state or municipality, this exemption from federal taxation does not extend to proprietary activities. For a decision on this point see Salt Lake City *v.* Hollister (1886) 118 U. S. 256; 30 L. ed. 176. The city in this case made the unusual plea that inasmuch as it was not authorized by its charter to engage in the business of distilling spirits it could not be taxed on the spirits produced. The Supreme Court ridiculed this *ultra vires* plea. This case is all the more striking because it was brought by the city against the local collector of internal revenue to recover moneys paid to him as a tax under protest. See also City of Philadelphia *v.* Diehl (1867) 5 Wall. 720; 18 L. ed. 614 (tax on what was alleged to be a municipal gas works).

For a decision holding that the United States will not tax a municipality see United states *v.* Baltimore & Ohio Ry. Co. (1873) 17 Wall. 322; 21 L. ed. 597. In this case the court held that an attempt to collect a federal tax upon interest payable by the railroad company to the city was *ultra vires*. The court said, "A municipal corporation is a representative not only of the state, but is a portion of its governmental power."

In Mercer Co. *v.* Cowles (1869) 7 Wall. 118; 19 L. ed. 86, the county challenged the jurisdiction of the federal courts in an action upon its bonds on the ground that by the state statute creating it, it could be sued only in the county circuit courts. The Supreme Court said that such a statute could not be availed of as against the jurisdiction of the federal court. "The power to contract with citizens of other states implies liability to suit by citizens of other states" and such cases are cognizable by the federal courts.

A railroad incorporated under a federal charter gains from it no vested right against the exercise of the proper police power of the city. Ill. Cent. Ry. Co. *v.* City of Chicago (1900) 176 U. S. 646; 44 L. ed. 622.

As to taxation of federally incorporated railroads see Union Pacific Railroad *v.* Peniston (1873) 18 Wall. 5; 21 L. ed. 787.

Municipal corporations may be distinguished from corporations in general, not by the manner of their creation, but by the purposes for which they are formed. In contrast to business, social, and even eleemosynary corporations, municipal corporations are formed for public rather than private purposes.[19] Also, municipal corporations are compulsory rather than voluntary in their nature. An individual may choose to become a member of a private corporation, but he becomes a member of a municipal corporation by virtue of residence within the territorial limits over which the corporation is authorized by law to exercise its jurisdiction. Further, it has become customary to confer perpetual succession on municipal corporations while private corporations usually are created for a fixed term of years.

There are various types of municipal corporations. They may be classified as (1) corporations for general purposes, (2) corporations for limited purposes, and (3) corporations for special purposes. In most states the municipal corporations for general purposes of government include cities, villages, towns, or boroughs; those for limited purposes include counties and townships; while those for special purposes include school districts, drainage districts, sanitary districts, water supply districts, port authorities, and others.[20] Usually only corporations for general purposes are given the power to make ordinances, though those for limited and special purposes sometimes are granted power to make by-laws to further the special objects for which they have been created.[21]

3. The Powers of a Municipal Corporation

In the countries of continental Europe it is customary for the central government, in creating or chartering municipal corporations, to endow them with extensive and undefined powers. Under the influence of this practice, the cities of Europe have been recognized to possess all powers not expressly reserved to the general government or denied to them by the constitution and statutes. Often these reservations are vital and extensive, such as the police power which was reserved to the central government of Prussia. But the principle of a broad general grant of powers clearly prevails.

[19] Dillon, J. F., *op. cit.*, vol. I, p. 141, secs. 90-92; McQuillin, E., *op. cit.*, vol. I, p. 248, sec. 106.

[20] See McQuillin, E., *op. cit.*, vol. I, p. 269, secs. 111-115.

[21] See Flanigan *v.* County of Sierra (1905) 196 U. S. 553; 49 L. ed. 597.

In contrast, England and the United States have adopted an opposite policy of defining the powers of municipalities strictly and in specific terms. Charter enumerations of powers are the rule. This situation has not always existed. In the early colonial days the towns of New England were authorized by a broad grant to regulate their "prudential affairs." But by the middle of the nineteenth century this practice was nearly obsolete.

The existing system in this country has given rise to a judicial doctrine of strict construction of the powers of municipal corporations in contrast to the loose construction followed in continental Europe. A European city is considered to have power to act unless it can be shown clearly that such power has been reserved to the central government or denied to the city.[22] An American city is considered to have no power which it cannot show has been clearly granted to it. The American rule is probably best expressed by Judge John F. Dillon in his treatise on the law of municipal corporations. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the exercise of power is resolved by the courts against the corporation and the power is denied.[23]

Judge Dillon's rule, produced as it was from a careful examination of all of the reported American and English cases, has, since its first appearance in print in 1872, been quoted with approval by many state and federal courts and may be taken as an accurate expression of the law today. The second of the three classes of powers mentioned by him, however, has been freely used to mitigate the harshness of the rule under the rapidly changing conditions of population and scientific advance which have characterized the last half century. The field of implied powers has been so broadened that, in the absence of express limits, cities possessing the ordinary powers usually granted to such corporations a half century ago may still cope with the problems pre-

[22] As a matter of fact, European cities are subjected to administrative control which reduces this apparent freedom to a considerable extent.

[23] Dillon, John F., *Commentaries on the Law of Municipal Corporations,* 5th ed., Boston, 1911, vol. I, pp. 448-450, sec. 237.

sented by the telephone, automobile, and radio.[24] Here, at least, the courts seem to have been guided more by reason than by precedent. The third class mentioned by Judge Dillon seems to suggest the possibility of the existence of certain inherent powers in municipal corporations. But these include only such powers as corporations possess at common law, such as the power to contract, to sue and be sued, to acquire, hold and dispose of property,[25] and to have and use a seal.[26] Even then, such powers are implied only in the case of municipal corporations for general purposes. It is sometimes said that general police powers may be so implied, but precedent has established an opposite rule.

An examination of the general law of almost any state so far as it relates to cities would reveal the powers that those cities might exercise set forth in a long itemized list. By far the majority of special and home-rule charters follow the same rule. But there seems to be a tendency now among charter and legislative draftsmen to revert to

[24] See also McQuillin, E., *op. cit.*, vol. I, p. 794, sec. 357.

McBain, H. L., *American City Progress and the Law.* Chapter II, "Breaking Down the Rule of Strict Construction of Municipal Powers." pp. 30-57. New York, 1918.

For implications of power to tax telegraph companies at a certain rate per pole for the use of streets from power to regulate the use of streets see City of St. Louis *v.* Western Union Telegraph Co. (1893) 148 U. S. 92; 37 L. ed. 380; (1893) 149 U. S. 465; 37 L. ed. 810; also Postal Telegraph Cable Co. *v.* City of Baltimore (1895) 156 U. S. 210; 39 L. ed. 399.

Power to issue negotiable bonds may not be inferred from power to borrow money. Barnett *v.* City of Denison (1892) 145 U. S. 135; 36 L. ed. 652; City of Brenham *v.* German American Bank (1892) 144 U. S. 173; 36 L. ed. 390; Police Jury *v.* Britton (1873) 15 Wall. 566; 21 L. ed. 251.

For contrary view see Seibert *v.* Mayor (1864) 1 Wall. 272; 17 L. ed. 553.

Power to regulate water rates will not be implied from power to control the streets: City of Winchester *v.* Winchester Waterworks Co. (1920) 251 U. S. 192; 64 L. ed. 221.

[25] Property owned by a municipal corporation is not liable to seizure and sale upon execution. City of New Orleans *v.* Louisiana Construction Co. (1891) 140 U. S. 654; 35 L. ed. 556.

[26] See McQuillin, E., *op. cit.*, vol. I, p. 777, sec. 351.

In Thomas *v.* City of Richmond (1871) 12 Wall. 349; 79 U. S. 349; 20 L. ed. 453, the city was sued on a number of one- and two-dollar notes which had been issued during the Civil War to circulate as currency. The plaintiff contended that power to issue such notes should be implied from the charter which provided "that the city shall have all the rights, franchises, capacities, and powers appertaining to municipal corporations." The Supreme Court answered that "in a community in which it is against public policy as well as express law, for any person or body corporate to issue small bills to circulate as currency, it is certainly not one of the implied powers of a municipal corporation." Power to borrow money and issue bonds therefor was held equally ineffective to confer authority to issue bills of credit.

Implied power to borrow money was denied in City of Nashville *v.* Ray (1874) 19 Wall. 468; 22 L. ed. 164.

As to power to accept bequests in trust see: Perin *v.* Carey (1861) 24 How. 465, 16 L. ed. 701; McDonough's Exr's. *v.* Murdoch (1853) 15 How. 367; 14 L. ed. 732; Wheeler *v.* Smith (1850) 9 How. 55; 13 L. ed. 54. Town of Pawlet *v.* Clark (1815) 9 Cranch 292; 3 L. ed. 735; Vidal *v.* Philadelphia (1844) 2 How. 127; 11 L. ed. 205.

the earlier rule, omitting entirely the enumeration of powers, and claiming for the city the right to exercise "all municipal functions." If such a practice should become general the courts would be forced to undertake a new task—namely, the definition of the limits of "municipal functions."[27]

As has been the practice of the courts in defining the "police power" and "due process of law" the phrase "municipal functions" would probably be defined by a process of inclusion and exclusion. If the courts should look to the older general laws and charters to find out what were formerly considered municipal functions, little would be gained by this new practice. But, on the contrary, if any power which had ever been exercised by a municipality were *ipso facto* to be deemed municipal, a vast extension in municipal powers and functions might ensue. Probably neither course would wholly govern judicial action. But if it were made easier by this method to keep pace with social and economic changes and city growth, an improvement over the older method would be effected.

Another distinction may be noticed between European and American methods of conferring municipal powers. In Europe the grant is made to the corporation as such. As the corporation usually includes all of the people living in a defined area, such a grant is to the whole group. In the United States, on the contrary, the grant is usually made to some official or group. Of course the result is almost the same, as in either case the legislative body of the municipality must usually act. One difference lies in the fact that under the American practice certain powers may be conferred upon some officer or board acting independently of the council. If these powers are in the nature of duties, they may be enforced by mandamus, while no such action can be brought against the council to compel the exercise of its discretionary powers.[28]

[27] See McQuillin, E., *op. cit.*, vol. I, p. 395, secs. 173-75; also *Ibid.* p. 791, sec. 355.

[28] Dillon, J. F., *op. cit.*, vol. IV, p. 2656, sec. 1489; McQuillin, E., *op. cit.*, vol. I, p. 826, sec. 376-381.

A municipal corporation is not liable for losses consequent upon its having misconstrued the extent of its powers or for failure to observe a law of its own for which no penalty is provided. Fowle *v.* Alexandria (1830) 3 Pet. 398; 7 L. ed. 719. A city is liable upon a contract made without advertisement for bids as required by an ordinance of the city. Worthington *v.* City of Boston (1894) 152 U. S. 695; 38 L. ed. 603.

When a power permissive in form is given to a municipality and the public interests or individual rights call for its exercise, it is in fact mandatory, and municipal officers may be compelled to act. Rock Island Co. *v.* U. S. ex rel. U. S. Bank (1867) 4 Wall. 435; 18 L. ed. 419; Mason *v.* Fearson (1850) 9 How. 248; 13 L. ed. 125.

See New Orleans Waterworks Co. *v.* City of New Orleans (1896) 164 U. S. 471; 41 L. ed. 518 for statement of court as to restraining the use of the ordinance power.

The legislative body of a municipal corporation exercises its powers principally through the passage of ordinances or by-laws,[29] although certain types of business may be transacted by resolution or by ordinary motion. The chief difference between an ordinance or by-law and a resolution or motion is in the formal requirements which the former must satisfy. An ordinance usually must have an enacting clause, a resolution need not; an ordinance usually must receive more than one reading on different days, a resolution need not; an ordinance usually must be published, a resolution need not. Due to these formal and procedural requirements, ordinances are deemed to be more suitable than resolutions for the establishment of permanent rules for the conduct of individuals who may be within the city. However, a resolution which has been passed with all of the formalities surrounding the enactment of an ordinance has been held to have the force of an ordinance, notwithstanding its form.[30]

As a general rule, ordinances are used to enact a more or less permanent rule of conduct, while resolutions are used in the transaction of administrative business. Examples of the former include regulations of dance halls and pool halls; of the latter, the making of public improvements. Ordinary motions are used in the making of decisions during the conduct of the council meeting which do not require the formal evidence of ordinance or resolution. The term "by-law" or "bye-law" is synonymous with "ordinance" and these are used interchangeably in some states.[31] "Bye-law" is used exclusively in England. Following the practice established by business corporations in adopting by-laws to supplement the charter and to provide rules for the conduct of meetings of the corporation, some municipalities make use of by-laws as mere rules of order for the conduct of council meetings. If use of the term is to be retained in this country, some such clear distinction between ordinances and by-laws would be desirable. But such a distinction certainly is not generally accepted yet.

Finally, it should be noted that, in common with other corporations, municipalities can exercise their powers, enforce their ordinances, and carry on their business only through agents, known in law as officers or

[29] See McQuillin, E., *op. cit.*, vol. I, p. 823, sec. 373.

[30] Dillon, J. F., *op. cit.*, vol. II, p. 893, sec. 571; McQuillin, E., *op. cit.*, vol. II, p. 1393, sec. 633.

A franchise may be granted either by contract based upon resolution or by ordinance. Fanning *v.* Gregoire (1853) 16 How. 524; 14 L. ed. 1043.

[31] Dillon, J. F., *op. cit.*, vol. II, p. 892, sec. 570.

employees.[32] The corporation is liable for their torts if they are acting in a proprietary or non-governmental capacity and not liable if they are carrying on some governmental function.[33] But a city is always liable upon contracts expressed or implied made within the scope of the authority of its proper agents.[34]

[32] The branch of law respecting the rights and liabilities of these agents is known as administrative law.

As to service of process upon a municipal corporation see City of Sacramento *v.* Fowle (1875) 21 Wall. 119; 22 L. ed. 592. When authority is given to several for a public purpose, it may be exercised by a majority of their number. Cooley *v.* O'Connor (1871) 12 Wall. 391; 20 L. ed. 446.

[33] Dillon, J .F., *op. cit.*, vol. IV, p. 2837, secs. 1625 ff.

For case concerning liability of city for acts of officers in excess of their authority although in connection with a governmental function see Old Colony Trust Co. *v.* City of Seattle (1926) 271 U. S. 426; 46 Sup. Ct. Rep. 552; 70 L. ed. 1019.

For cases respecting liability of municipal corporations to keep streets in repair see Weightman *v.* Washington (1862) 1 Black 39; 17 L. ed. 52; Barnes *v.* District of Columbia (1876) 91 U. S. 540; 23 L. ed. 440; Nebraska City *v.* Campbell (1863) 2 Black 590; 17 L. ed. 271; Chicago *v.* Robbins (1863) 2 Black 418; 17 L. ed. 298. (Also concedes right of municipality to contribution from private individual liable for defect).

In St. Paul Water Co. *v.* Ware (1873) 16 Wall. 566; 21 L. ed. 485, a suit against the company for personal injuries was defended on the ground that the defect which caused the injury was in the street. The court held that the company had contracted with the city to protect it from damage suits due to the company's negligence. The suit could have been brought against either the company or city at the election of the plaintiff, as the city was entitled to recover from the company if the suit was successful.

See also: Robbins *v.* Chicago (1867) 4 Wall. 657; 18 L. ed. 427; Maxwell *v.* District of Columbia (1876) 91 U. S. 557; 23 L. ed. 445; Dant *v.* District of Columbia (1876) 91 U. S. 557; 23 L. ed. 446; City of Providence *v.* Clapp (1854) 17 How. 161; 15 L. ed. 72; Mayor *v.* Sheffield (1867) 4 Wall. 189; 18 L. ed. 416.

[34] Dillon, J. F., *op. cit.*, vol. II, p. 1137 ff.

City held liable on implied contract for money had and received when supposed bonds of city are held invalid due to misconduct of the city's fiscal agent. City of Louisiana *v.* Wood (1880) 102 U. S. 294; 26 L. ed. 153.

In a case, however, where the municipality had issued paper money in violation of law, and the same law made it a misdemeanor to receive such currency, the holder could not maintain an action for money had and received. Thomas *v.* City of Richmond (1871) 12 Wall. 349; 20 L. ed. 453.

Bonds signed by a mayor who had gone out of office before the bonds were issued, the bonds being dated back during his term of office held void even in the hands of innocent holders.. Coler *v.* City of Cleburne (1889) 131 U. S. 162; 33 L. ed. 146.

In a suit to enforce certain railroad bonds the defense was that they had not been executed by the proper municipal agents. The court said, "No one can doubt that it is competent for the legislature to determine by what agents a municipal corporation shall exert its powers. The statute in question did designate the agents, and their acts within the authority conferred are binding upon the town." Town of Queensbury *v.* Culver (1874) 19 Wall. 83; 22 L. ed. 100.

In Lynde *v.* County of Winnebago (1873) 16 Wall. 6; 21 L. ed. 272 a county sought to avoid payment of certain county courthouse bonds on the ground that they had been executed outside of the county, and that the vote upon the bonds was insufficient. The court said that when a particular functionary is vested with the duty of deciding whether the requisite number of persons have voted in favor of a proposition his decision, in the absence of fraud or collusion, is final. Also it was held that ministerial

4. The Legal Nature of Municipal Ordinances

As a corollary to the doctrine of the separation of powers, which is universally accepted in our state governments, we have evolved the principle that legislative power once granted to a legislative body by the people may not be delegated. A generally recognized exception to this general rule is that the legislature may confer upon the subordinate bodies politic of the state the right, within limits, to say what the law shall be.[35] Recognizing this exception, the courts uniformly hold that municipal ordinances are legislation and not mere administrative orders.[36] The rule of non-delegation of legislative power applies to municipalities, however, and the local council may not devolve it upon third parties, unless such delegation is expressly authorized by the charter.[37]

The constitutional rules respecting formalities to be observed in the enactment of laws by the legislature, however, are not applicable to municipal legislation. Neither is the constitutional guaranty of jury trial applicable to prosecutions under municipal ordinances, as summary

powers, to be valid, need not be performed within the territorial limits of the jurisdiction for which they are exercised.

When a mandamus has properly issued against the officers of a municipality, and has been disobeyed, such persons are liable not only for contempt but also for a civil suit for damages by any person injured by their failure to act. Amy *v.* Barkholder (1871) 11 Wall. 136; 20 L. ed. 101; Farr *v.* Thompson (1871) 11 Wall. 139; 20 L. ed. 102.

Municipal officers who have been ordered by writ of mandamus from a federal court to do some act may not plead in justification of their failure to do so any restraining order or injunction against the performance of the act issued by a state court, whether such injunction was issued before or after the issuance of the federal mandamus. Davenport *v.* U. S. ex rel. Lord (1870) 9 Wall. 409; 19 L. ed. 704. (For other cases see Chapter 3.)

A city is not liable in tort for false statements made by its agents concerning validity of municipal bonds when such statements were not required by law. The purchaser is charged with knowledge of the invalidating facts and the law. Moore *v.* City of Nampa (1928) 276 U. S. 536; 48 Sup. Ct. Rep. 340; 72 L. ed. 688.

[35] Dillon, J. F., *op. cit.*, vol. II, p. 901, sec. 573; McQuillin, E., *op. cit.*, vol. I, p. 839, secs. 382, 384, 386.

See New Orleans Waterworks Co. *v.* New Orleans (1896) 164 U. S. 471; 41 L. ed. 518.

[36] For a suggestion of a contrary view see Luce, *Legislative Procedure*, and New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co. (1888) 125 U. S. 18; 31 L. ed. 607.

[37] Dillon, J. F., *op. cit.*, vol. I, p. 463, sec. 245.

In Hitchcock *v.* City of Galveston (1878) 96 U. S. 341; 24 L. ed. 659 the court said, "The council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents." Also in Clark *v.* The Mayor (1827) 12 Wheat. 40; 6 L. ed. 544, Chief Justice Marshall remarks that "A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents."

See: Ex Parte Tong (1883) 108 U. S. 556; 27 L. ed. 826.

procedure for the enforcement of ordinances was clearly recognized by the common law. Courts differ as to whether prosecutions for the violation of municipal ordinances are civil or criminal actions. Such differences depend to some extent on the character of the penalty provided.[38] But it seems to be the weight of authority that ordinances are not laws of the state to such an extent that prosecution under an ordinance will bar prosecution under a state law.[39] In most states, municipalities may pass ordinances paralleling the state statutes prohibiting the commission of misdemeanors, although in almost every case the ordinance penalty may not be less than the amount prescribed in the statute. The punishment of felonies is recognized as the exclusive province of the state. Likewise the civil law of the state is not subject to municipal modifications or even interference by ordinance. It is considered by the courts to be very essential that uniformity be maintained where property rights are involved.

Another generally accepted rule prevents the ordinances of a municipality from having any binding effect beyond the limits of its territorial jurisdiction.[40] This rule may be and sometimes is modified by express statute, although courts differ as to whether such extraterritorial effect may ever be constitutionally granted.[41]

Ordinances may, however, have an incidental effect upon civil actions at law between private individuals. Three cases involving this point have been before the Supreme Court. In the first of these an ordinance of the city of Chicago granting a right of way and requiring a railroad company to construct suitable guards to protect the public in its access to a public park, was pleaded in an action for damages for personal injuries as conclusive evidence of the company's duty. The company, having failed to comply with the ordinance, was held to

[38] McQuillin, E., *op. cit.*, vol. III, p. 2367, sec. 1064. See: Ex Parte Tong (1883) 108 U. S. 556; 27 L. ed. 826.

[39] Cooley. Const. Lim. 199; March *v.* Com. 12 B. Mon. (Ky.) 25, 29; Howe *v.* Plainfield, 37 N. J. L. 145; Dillon, J. F., *op. cit.*, vol. II, pp. 967-972.

[40] See McQuillin, E., *op. cit.*, vol. II, p. 1434, sec. 657.

In Henderson Bridge Co. et al. *v.* City of Henderson (1891) 141 U. S. 679; 35 L. ed. 900, the company maintained that the city's power to tax was restricted to a smaller area than the corporate limits, as the Ohio River, over which the city's jurisdiction extended, was a navigable stream and because the bridge over the river could derive no benefits from the city government in return for taxes paid. The Supreme Court held that the decision of the state court that the power to tax was co-extensive with the boundaries, was not erroneous.

[41] Anderson, William. "Extraterritorial Powers of Cities," 10 Minn. Law Rev. 475; 564 (1927).

have been *prima facie* negligent. The ordinance was not a contract but a police regulation.[42]

In the second case an ordinance of the city of Hot Springs, Arkansas, granting a right of way through a street to a railroad company was pleaded by the company as a defense to an action for damages to property abutting upon the street. The Supreme Court, however, held that the ordinance did not excuse the company from paying owners of private property for damages to their property caused by the construction of the railway in the street.[43]

In the third case, another ordinance of the city of Chicago was involved. The plaintiff was a liquor dealer in Chicago. He sold some wine to a resident of Wisconsin on credit. The purchase price not having been paid, he brought suit in the United States courts. The defendant pleaded an ordinance of the city of Chicago which made sales of liquor by persons who had not obtained a license illegal and proved that the plaintiff had no such license at the time the sale was made. The court held the ordinance valid and hence the contract was illegal and no recovery could be had on it. This was held to be true even though there was a penalty provided in the ordinance, the denial of right to recover being in the nature of an additional penalty.[44]

The effect of local port regulations upon actions in admiralty is shown by two cases. In the first a libel had been brought for damages resulting from a collision. An ordinance of the town of Grand Gulf, Louisiana, where the collision occurred provided that the various kinds of boats must use different places for landing. The Supreme Court said, "Whether a rule on this subject be established by ordinance or by general usage is immaterial, if the regulation has been so made as to be generally known, and this seems to have been the case at Grand Gulf with reference to the ordinance in question.[45]

In the other, a case of collision in the port of Charleston was involved. The plaintiffs alleged that the James Gray had been lying in a thoroughfare in the river in violation of local port regulations and without the light these regulations required. They produced two ordinances of the city of Charleston to prove their contention. The

[42] Hayes *v.* Michigan Central Railroad Co. (1884) 111 U. S. 228; 28 L. ed. 410. See Dillon, J. F., *op. cit.*, p. 1094.

[43] Hot Springs R. R. Co. *v.* Williamson (1890) 136 U. S. 121; 34 L. ed. 355. See Dillon, J. F., *op. cit.*, p. 2014.

[44] Miller *v.* Ammon (1892) 145 U. S. 421; 36 L. ed. 759.

[45] Culbertson *v.* The Southern Belle (1855) 18 How. 584; 15 L. ed. 493. See also McQuillin, E., *op. cit.*, vol. II, p. 1702, sec.793.

power and authority of the city authorities to pass the ordinances was disputed by the appellants.[46] Chief Justice Taney, however, pointed out in the opinion that

> Regulations of this kind are indispensable in every commercial port, for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there; where she may unload or take on board particular cargoes; where she may anchor in the harbor, and for what time; and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in every port, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred upon the courts of the United States.

For purposes of testing their constitutionality under the contract and due process clauses of the Federal Constitution as well as other clauses placing prohibitions upon the states, municipal ordinances, when passed under authority of state law, are held by the Supreme Court to be laws of the state.[46a] On the other hand, a municipal ordinance levying taxes is not a revenue law of a state within the meaning of an Act of Congress authorizing the Supreme Court to advance cases involving the validity of state revenue laws on its calendar.[47] Nor does the Judiciary Act of 1925, Sec. 266, requiring a federal judge to call two other judges to sit with him at a hearing on an application to restrain "the enforcement, operation, or execution" of a statute of a state, extend to such cases involving municipal ordinances.[47a]

In view of this attitude of the Supreme Court respecting municipal ordinances as being on the same plane as state statutes, decisions of that tribunal affecting state laws under the prohibitory clauses of Article 1, Section 10 and the Fourteenth Amendment are applicable also to ordinances. This study, however, does not, with a few exceptions,

[46] The James Gray *v.* The John Fraser (1858) 21 How. 184; 16 L. ed. 106.

[46a] For a complete discussion of this point see King Mfg. Co. *v.* City of Augusta (1928) 277 U. S. 100; 48 Sup. Ct. Rep. 489; 72 L. ed. 801. Brandeis and Holmes, JJ., dissent on the ground that Congress in striking from the clause defining the jurisdiction of the Supreme Court on error the words "or an authority exercised under any state" had intended to relieve the court by limiting the absolute right to a review by it of cases involving municipal ordinances.

[47] City of Davenport *v.* Dows (1873) 15 Wall. 390; 83 U. S. 390; 21 L. ed. 96.

[47a] Ex parte Collins (1928) 277 U. S. 565; 48 Sup. Ct. Rep. 585; 72 L. ed. 990.

quote these decisions as to state laws, although citations to them appear in the footnotes.

Municipal ordinances are of three general types: (1) administrative, (2) contractual, and (3) penal.[48] Administrative ordinances deal with the organization, powers and duties of the municipal officers. Such ordinances do not usually include a penalty and create no contractual obligations. Contractual ordinances consist principally of franchises granting rights to private persons or corporations in the use of public property. Such ordinances may also include regulatory sections for a violation of which a penalty may be imposed.[49] Penal ordinances are those establishing regulations for the guidance of the public and for the use of public property. For a violation of such ordinances a fine or imprisonment may be imposed as a penalty.

The limitations upon the power to make such ordinances may be summarized as follows:[50]

1. They may not exceed the powers granted in the city charter.[51]

2. They must be enacted and promulgated in accordance with the formalities prescribed by law.

3. They may not conflict with any higher grade of law.[52] In addition, considerations of expediency frequently impose further limits.

[48] For a different classification see McQuillin, E., *op. cit.*, vol. II, p. 1406.

[49] See McQuillin, E., *op. cit.*, vol. II, p. 1408, sec. 642.

[50] For a list of ten requisites of a valid ordinance see McQuillin, E., *op. cit.*, vol. II, p. 1414, sec. 645.

[51] The repeal of an act authorizing the passage of an ordinance abates any prosecution for a violation of the ordinance according to Flanigan *v.* County of Sierra (1905) 196 U. S. 553; 49 L. ed. 597.

Likewise a constitutional amendment prohibiting the issuance of railroad aid bonds extinguishes prior statutory authority to issue such bonds even though proceedings to issue them had been begun before the new constitution went into effect.

But although power to issue bonds was wanting when election was held, a subsequent act of the legislature ratifying the election cures all defects and bond issues are valid. Jonesboro *v.* Cairo & St. Louis Ry. Co. (1884) 110 U. S. 192; 28 L. ed. 116.

But the city itself cannot ratify such an election where no authority existed or is subsequently conferred. Lewis *v.* Shreveport (1883) 108 U. S. 282; 27 L. ed. 728.

See Cami *v.* Central Victoria, Ltd. (1925) 268 U. S. 469; 45 Sup. Ct. Rep. 570. 69 L. ed. 1056.

[52] See McQuillin, E., *op. cit.*, vol. II, p. 1608, sec. 740.

A verdict for an amount less than that due under an ordinance imposing a tax is an expression by the jury that the amount of the tax as fixed by the ordinance is unreasonable, hence the ordinance is void. Postal Telegraph Cable Co. *v.* Borough of New Hope (1904) 192 U. S. 55; 48 L. ed. 338.

Bonds issued in excess of a constitutional debt limitation are void even as against a bona fide holder in due course. Buchanan *v.* City of Litchfield (1880) 102 U. S. 278; 26 L. ed. 138.

But a city may be authorized to exceed a statutory debt limit, and bonds issued under such authority are valid. Amey *v.* Allegheny City (1860) 24 How. 364; 16 L. ed. 614.

The higher grades of law with which such ordinances may not conflict are suggested above. This study will deal with only one of the groups there suggested — limitations imposed by the Constitution of the United States as interpreted by the United States Supreme Court.

The decisions of the United States Supreme Court in which municipal ordinances are drawn into question seem to fall rather naturally into three principal groups. These correspond to the three clauses of the Constitution with which such ordinances are most frequently alleged to conflict. The first of these is the commerce clause, the second the contract clause, and the third the Fourteenth Amendment. The draftsman of a municipal ordinance, therefore, should take especial care that his product conforms to the requirements of these portions of the Constitution as interpreted by the Supreme Court. It is the purpose of this study, by arranging and analyzing these supreme court decisions, to indicate what this court has said as to what may and what may not be done under the Federal Constitution in the enactment and enforcement of a municipal ordinance.

Chapter II

MUNICIPAL ORDINANCES UNDER THE COMMERCE CLAUSE

By Clause 3 of Section VIII of Article I of the Constitution of the United States, Congress is given power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." During the Revolutionary conflict and the period of the Confederation, each state had dealt with commerce in its own way. This practice led to confusion in import duties, competition among the states for trade, and irritating retaliatory measures as between the states. The Congress under the Articles of Confederation was powerless to deal with this situation, which was rapidly leading to serious consequences in foreign trade and to virtual anarchy in domestic commerce.[1] The commerce clause in the Constitution of 1787 was an attempt at a solution for these commercial difficulties. One uniform rule was to be applied instead of thirteen diverse rules.

But the new Congress did not at once occupy the whole field of commercial regulation. This left the question as to how far the states might occupy the field in the absence of congressional action. This question was first answered in *Cooley v. The Board of Wardens.*[2] Here, in effect, the court said that when Congress had not acted, the first inquiry should be directed to whether or not the subject was one which demanded a uniform national rule. If so, the absence of congressional action must be deemed to indicate a desire on the part of Congress that no regulation should exist. But if the subject was one upon which uniformity was not essential, the state might legislate until Congress stepped in. Many of the cases considered under the commerce clause deal with determining to which of these two categories certain subjects should be assigned.

The general meaning of the commerce clause was first interpreted by Chief Justice Marshall in *Gibbons v. Ogden.*[3] In this case the

[1] Brown, D. W., *The Commercial Power of Congress,* New York, 1910.
Jones, Paul, *The Commercial Power of Congress,* New York, 1904.

[2] (1851) 12 How. 299; 13 L. ed. 996.

[3] (1824) 9 Wheat. 1; 6 L. ed. 23. See also, Burdick, C. K., *The Law of the American Constitution,* New York (1922) pp. 206-254.

term "commerce" was defined to include not only traffic, but also intercourse. Subsequent cases show that it includes the transmission of intelligence by telegraphy and telephone, the carriage of passengers as well as freight, by land or sea, and practice now seems to point to the inclusion of the air. It includes not only the persons or things being transported, but also the agencies by which the transportation is carried on. "The power to regulate," said Marshall, "is the power to prescribe the rule by which commerce is to be governed." It appears, from these leading cases, that Congress may prescribe by statute any rule it may wish, within constitutional limits, for the regulation of commerce, from the time such commerce begins to move in interstate or foreign trade channels until it has come to rest.[4]

1. Municipal Regulation of Navigation (General)[5]

In the case of *Escanaba and Lake Michigan Transportation Co. v. City of Chicago*,[5a] bridges over navigable waters were held to belong to the class of subjects which might be regulated by state action in the absence of congressional legislation. The company sought an injunction against the city to prevent the enforcement of an ordinance establishing rules for the operation of draws on bridges over the Chicago River. These rules prevented the free use of the river as a navigable water of the United States at the will of the company, which was engaged in interstate commerce. The company relied upon the plenary power of Congress over the subject matter and asked that the ordinance be held void as an infringement upon congressional authority. But the court, speaking through Mr. Justice Field, thought that the rights of the people who wished to use the bridges, especially during the rush hours of morning and evening as recognized by the ordinance, were

[4] For a discussion of general problems of constitutional law affecting interstate and foreign commerce see:

Landes, J. M., "The Commerce Clause as a Restriction on State Taxation," 20 Mich. Law Rev., 50-85 (1921).

Powell, T. R., "Supreme Court Decisions on the Commerce Clause and State Police Power," 21 Colum. L. Rev. 737 (1921), 22 Colum. L. Rev. 28, 133 (1922).

Wintersteen, A. H., "The Commerce Clause and the State," 28 Am. Law Reg. 733-747 (1889).

Uhle, John B., "The Law Governing an Original Package," 29 Am. Law Reg. 409-483 (1890), 721-765 (1890), 797-838 (1890).

Pomeroy, John Norton, "The Power of Congress to Regulate Interstate Commerce," 4 So. Law Rev. (N. S.) 357-403 (1878).

[5] Dillon, J. F., *op. cit.*, vol. I, p. 480, secs. 264, 265; McQuillin, E., *op. cit.*, vol. I, p. 899, sec. 409; vol. II, p. 1702, sec. 793.

[5a] (1883) 107 U. S. 678; 27 L. ed. 442.

at least equal to those of the company. Such regulations are valid regardless of their incidental effect upon interstate commerce.[6]

A regulation of an opposite character was presented for consideration in *Sanitary District of Chicago v. United States.*[7] Here the sanitary district was diverting from Lake Michigan through the drainage canal an amount of water in excess of that authorized by the Secretary of War. The United States applied to the courts under the commerce power to restrain this illegal diversion. The sanitary district claimed that it was using no more water than was necessary in the protection of the health and welfare of the citizens of Chicago, and said that as Congress had not acted it was free to act. Thus the question was squarely presented as to whether the commerce power was superior or subordinate to the welfare of a locality. The injunction was granted by the court, which made the following statement in its opinion:

> The power of the United States to remove obstructions to interstate and foreign commerce is superior to that of the states to provide for the welfare or the necessities of their inhabitants. In matters where the states may act, the action of Congress overrides what they have done. In matters where the national importance is imminent and direct, even where Congress has been silent, the states may not act at all.

One of the most frequently used methods of burdening interstate commerce is through taxation. Two cases involving municipal taxation of vessels, exclusive of ferries, used in navigating public water have been presented to the courts. The first of these arose out of an ordinance of the city of New Orleans imposing a license tax of $500 to be paid by every member of a firm or company running towboats to and from the Gulf of Mexico.[8] The city brought action to recover the amount of this license fee from the owner of two such vessels. The owner replied that the tugs were licensed as coasting vessels under Acts of Congress and that as applied to them the ordinance was void as an unlawful interference with commerce. The city replied that the tax was not upon the commerce but upon the occupation. The court ignored this contention and held that it was in effect a charge explicitly made as the price of the privilege of using and enjoying the license of the United States to employ the vessels in the coasting trade and hence that it was void under the rule of *Gibbons v. Ogden. (supra).*

[6] See also Gilman *v.* City of Philadelphia (1866) 3 Wall. 713; 18 L. ed. 96.

[7] (1925) 266 U. S. 405; 45 Sup. Ct. Rep. 176; 69 L. ed. 352.

[8] Moran *v.* City of New Orleans (1884) 112 U. S. 69; 28 L. ed. 653.

A similar ordinance passed by the city of Chicago was brought in question eight years later with the same result.[9] The city in this case claimed that the sum required was as compensation for the improvements made in the river at the expense of the city, but this was held not to be indicated by the ordinance.

One additional case falls under this general heading. This is *Henderson Bridge Co. v. City of Henderson.*[10] Here, among other contentions, the bridge company, in attacking the authority of the city to tax its property, maintained that although the city charter established the north boundary of the city as the state line at the low watermark on the Indiana shore, the city could not tax its structure beyond the Kentucky shore, as the Ohio River was an avenue of interstate commerce under the exclusive jurisdiction of Congress. But the admission of such a contention would have led to the absurd conclusion that all property which was located upon or over a navigable stream might be taxed by Congress only. This contention of the bridge company was denied by the state supreme court and its conclusion was affirmed on appeal by the United States Supreme Court.

2. Municipal Regulation of Navigation (Wharfage)[11]

Municipalities which lie adjacent to navigable waters usually are given power to regulate the use of the waterfront by vessels. If the wharf facilities are owned by private individuals such persons are, according to the common law, engaged in a public calling and regulation of their activities is thought quite fitting. Sometimes the municipality itself owns all or a part of the levee and in many cases it has built wharf facilities from public funds. Both public and private wharfingers usually collect a charge for the use of the wharf facilities. These charges have been the source of several actions in the Supreme Court on the theory that they are burdens upon commerce or that they are duties of tonnage such as the states are forbidden, by Article I, Section 10 of the Constitution, to lay without congressional consent.[12]

The first case involving wharfage came before the Supreme Court in 1874 from the supreme court of Louisiana.[13] The city of New

[9] Harmon *v.* City of Chicago (1892) 147 U. S. 396; 37 L. ed. 216.

[10] (1891) 141 U. S. 679; 35 L. ed. 900.

[11] Dillon, J. F., *op. cit.*, vol. I, p. 514, sec. 273; McQuillin, E., *op. cit.*, vol. I, p. 887, secs. 402-405.

[12] See Chapter V, post.

[13] Cannon *v.* New Orleans (1874) 20 Wall. 577; 22 L. ed. 417.

Orleans had enacted an ordinance in 1853 establishing a charge called "levee dues" of ten dollars per ton burden for all vessels if in port not exceeding five days and five dollars per day thereafter. The city claimed that the money so collected was in compensation for the use of the levees, which were city property. Evidence was introduced to show that the ordinance applied to more than twenty miles of levee and river bank within the city, not more than one-tenth of which was improved. Vessels landed at various places where no accommodations existed. Under the ordinance the tax was collectible whether the landing was at a wharf or not, or even if the vessel anchored in the middle of the river. The court held the tax invalid as being a duty of tonnage within the prohibition of the Constitution.

The next case arose out of an ordinance of the city of Keokuk, Iowa, which established rates for wharfage to be paid by boats landing at the improved wharf which the city had built within its limits.[14] The court held these charges to be in no sense a regulation of commerce between the states, but valid charges for the use of property and referred to the case of *Cannon v. New Orleans,* pointing out the differences in the nature of the charge involved.[15]

In *Guy v. Baltimore,* a different point was presented.[16] The city of Baltimore had, under authority from the state legislature, improved its wharves and had provided by ordinance for the collection of wharfage dues from all vessels using them for the purpose of landing goods *other than products of the state of Maryland.* When the ordinance was attacked as being discriminatory because it placed a burden on interstate commerce, the city replied that as the wharves belonged to the city it had the right to exact a reasonable compensation for their use, and that persons bringing in produce from other states could not complain if the city saw fit to exempt from these payments all produce of the state of Maryland. The court, however, held the charge invalid saying that the city could no more discriminate against the produce of another state than could the state itself. It could permit the wharves to be used free of charge by every one or it might impose uniform charges upon all who used them. But it could not employ its property

[14] Keokuk Northern Line Packet Co. *v.* Keokuk (1877) 95 U. S. 80; 24 L. ed. 377.

[15] For additional cases presenting similar facts and conclusions, see:
Northwestern Union Packet Co. *v.* City of St. Louis (1880) 100 U. S. 423; 25 L. ed. 688; Mayor and Aldermen of Vicksburg *v.* Tobin (1880) 100 U. S. 430; 25 L. ed. 690.

[16] Guy *v.* City of Baltimore (1880) 100 U. S. 434; 25 L. ed. 743.
See also *Cent. Law Jour.* 276-281 (1876).

to hinder, obstruct, or burden interstate commerce in the interests of commerce wholly internal to the state.

An ordinance of the town of Catlettsburg, Kentucky, in addition to providing a wharfage charge, required the landing of vessels only at the municipal wharf. This requirement was attacked as an unlawful invasion of the field reserved to Congress.[17] The court, however, recognized the necessity of some such regulation and said that although it might affect interstate commerce, yet Congress had not acted and the subject belonged to that class which might be properly dealt with by local rule in the absence of national regulation. The company also objected to the wharfage charges as being excessive on the ground that enough already had been collected to build the wharf. The court, however, pointed out the fallacy of such an argument, holding that there was no necessary relation between the cost of the wharf and the charges which could legally be made for its use.

A similar ordinance of the city of Parkersburg, West Virginia, was attacked on the ground of exorbitant wharfage.[18] In this action the company claimed that the wharfage charges were so high as to abridge the free use of the Ohio river. A direct accusation was made that the revenue from the wharfage dues was not used in repairing, maintaining, or constructing wharves, but for general city purposes, thus reducing the amount to be raised from taxation upon the inhabitants. Mr. Justice Bradley, in the opinion of the court, said that since a wharfage charge was proper the question of whether the owner derived revenue from it — more or less than the cost of maintaining the wharf — or what disposition he made of that revenue would in no case concern those who made use of the wharf, provided the charges were reasonable. The question of reasonableness of wharfage was held to be a question for the state courts to decide. Concerning the nature of wharfage charges and their possible effect upon interstate commerce, the court said:

> Until the local law is displaced or overruled by paramount legislation adopted by Congress, the courts have no other guide than the local or state law. While Congress may regulate the navigable waters of the United States, of which the Ohio River is one, wharves and landing places are attached to the land and are primarily subject to local state laws. Congress has never yet interposed to supervise their

[17] Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. *v.* Town of Catlettsburg (1882) 105 U. S. 559; 26 L. ed. 1169.

[18] Parkersburg and Ohio River Transportation Co. *v.* City of Parkersburg (1883) 107 U. S. 691; 27 L. ed. 584.

administration, but has left this exclusively to the states. There is little doubt, however, if it saw fit, in case of abuses materially interfering with the prosecution of commerce, Congress might interpose and make regulations to prevent such abuses. Until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of federal cognizance. The use of the public wharves certainly does not belong to that class of subjects which are in their nature national requiring a single uniform rule; but to that class which are in their nature local, requiring a diversity of rules and regulation. [19]

3. Municipal Regulation of Navigation (Ferries)[20]

Although ferry boats usually operate upon the navigable waters of the United States, the Federal Government has never assumed to abridge the power exercised by the states in regulating them, even where the ferry is operated across a stream which forms a state boundary, except in the case of ferries operated in connection with railroads. Here, again, we find a subject which is in its nature local and which may be regulated by local rule in the absence of federal legislation, although, as in the case of wharfage, Congress may enter the field under the commerce power if it sees fit.

Only five cases appear to have been decided affecting municipal regulations. The first of these concerned an ordinance of the city of St. Louis which attempted among other things to impose a license tax in a stated sum for each vessel used in the ferry business across the Mississippi River.[21] The question upon which issue was taken was as to whether or not the boats had a taxable situs in Missouri. In deciding this question the court first laid down the proposition that the power of a municipality to levy taxes may not extend beyond the borders of the state which created it. Thus the city could not tax personal property such as boats unless it could establish their situs or the domicile of their owner within their jurisdiction. It was found from the testimony that the home port of the boats and the location of the offices of the company were East St. Louis, Illinois. Taxes were there paid to the state of Illinois. As the relation of the boats to the city of St. Louis

[19] For another case with similar facts and conclusions, see:
Ouachita & Mississippi River Packet Co. *v.* Aiken (1887) 121 U. S. 444; 30 L. ed. 976.

[20] See also Dillon, J. F., *op. cit.*, vol. I, p. 518, sec. 276; McQuillin, E., *op. cit.*, vol. I, p. 898, sec. 408. Port Richmond, etc. Ferry Co. *v* Hudson Co. (1914) 234 U. S. 317; 58 L. ed. 1330.

[21] City of St. Louis *v.* Wiggins Ferry Co. (1871) 11 Wall. 423; 20 L. ed. 192. See Dillon, J. F., *op. cit.*, vol. IV, p. 2418, sec. 1391.

was merely one of contact there, the tax was held to be invalid as to them.

The second case involved the same ferry but arose this time on the Illinois side of the river.[22] The city of East St. Louis brought action against the ferry company to recover the amount of a license tax imposed upon each ferry boat operated across the river from that point. The city had ample charter authority to license ferries and the company's charter did not exempt it from that type of taxation. But the company maintained that the license was a burden upon interstate commerce, contrary to the commerce clause, and that by virtue of the enrollment of its vessels under the Acts of Congress, they were thereby exempted from all such dues. The court, however, rejected these contentions, holding that although imposed for the purpose of raising revenue, the license was a valid exercise of the police power. It distinguished this from the St. Louis case by pointing out that here the boats had their taxable situs within the city's jurisdictional limits. The ordinance was held not to infringe upon the powers of Congress under the commerce clause, and the company's claim of exemption by virtue of the enrollment under the Act of Congress was denied.

In a more recent case a licensing ordinance of the city of Sault Ste. Marie, Michigan, was held invalid.[23] This ordinance required the taking out of a license as a condition precedent to lawful conduct of the ferry business between that city and Sault Ste. Marie, Ontario, Canada. Suit was brought by the ferry company, a Canadian corporation, to restrain the enforcement of the ordinance as violative of the commerce clause and of a treaty with Great Britain. As the ordinance was held invalid under the commerce clause its validity under the treaty was not considered.

The company held a Canadian license to operate a ferry between the Ontario and Michigan shores. It owned and used in the business two ferryboats of British registry. It leased a private wharf in the city of Sault Ste. Marie, Michigan, where it maintained an office and received fees. The Canadian license prescribed the frequency of the service and the maximum fares to be charged. It also provided that the licensee should not infringe any laws or regulations of the United States, or of the state of Michigan, or of the town of Sault Ste. Marie in reference to ferriage. The city (formerly the town) of Sault Ste.

[22] Wiggins Ferry Co. *v.* City of East St. Louis (1883) 107 U. S. 365; 27 L. ed. 419.

[23] City of Sault Ste. Marie *v.* International Transit Co. (1914) 234 U. S. 333; 58 L. ed. 1337.

Marie was authorized by its charter to establish, license, and regulate ferries and prescribe rates. Under this authority the city provided by ordinance that no ferry should be conducted except upon the payment of an annual license fee, and established regulations for service and fares. The operator of a ferryboat was arrested and fined for operating a boat for which no license had been obtained, and the company brought suit.

Mr. Justice Hughes, who delivered the opinion of the court, pointed out that the question was not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore — neither was it as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and public convenience; it was rather as to whether the state or city might make its consent a condition precedent to the prosecution of the business. He said:

> If the state or city may make its consent necessary, it may withhold it. Although the state might have the right to establish and license ferries, and grant ferry franchises, it is clear that, whatever authority the state may have for this purpose, it does not go so far as to enable the state to interdict one in the position of the appellee from conducting the commerce in which it is engaged, or justify the state in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent, express or implied. It must be taken as firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce. We think that the action of the city in the present case was beyond the power which the state could exercise either directly or by delegation.

It is a little difficult to reconcile the Sault Ste. Marie decision with that in the East St. Louis case. In both cases, municipal ordinances levying license taxes were drawn in question. In the earlier case the license was upheld as a valid police regulation, in the latter it was held invalid as an unlawful restraint upon commerce. Of course, it may be recognized at once that the license fees of $100 per boat in the East St. Louis case and of $50 per boat in the Sault Ste. Marie case do not offer any clue as to why one was a tax, the other a regulation. But it is significant that the earlier case was decided in 1883, the latter in 1914, thirty-one years later — thirty-one years in which this country had witnessed a phenomenal increase in commerce and a corresponding (or even an augmented) attempt on the part of the states to regulate

and profit from it. From an attitude of tolerance of minor local regulations of commerce the Supreme Court had come to an attitude of firm assertion of the imperative need for a free flow of commerce. Then, too, the East St. Louis case was one involving interstate commerce while foreign commerce was involved in the Sault Ste. Marie decision. Further, the boats at Sault Ste. Marie were under British registry. The company was a Canadian corporation, and while the opinion does not clearly define the domicile of the company it may be assumed that it was on the Canadian shore. Hence, if held to be a tax, the license could have been held invalid under the authority of the East St. Louis decision. There is also the probability that the court wished to avoid if possible the necessity of construing the treaty which the company alleged to be infringed by the regulation.

A distinction can, of course, be drawn between a tax and a license fee. The former is not a prerequisite to the lawful conduct of the business taxed and is enforced by civil proceedings in the same manner as other taxes. The latter may be made a prerequisite to the permission of the municipality to carry on the business and is enforced by a stoppage of the business and possibly the arrest and fine or imprisonment of the proprietor or his agent. Also, the license fee may not exceed in amount the cost of issuing the license and conducting the necessary police supervision of the licensed business. An ordinance imposing a license fee usually provides for such regulation as is deemed necessary in the public interest, while a tax ordinance is solely for the purpose of revenue. Under the laws of certain states a single measure may partake of characteristics of both a tax and a police regulation. In view of the facts set forth in this Sault Ste. Marie case, however, it is difficult to reconcile it with the East St. Louis case on any ground except that of distinction between tax and license. Even here the distinction is far from clear, as the court in the East St. Louis case, although the principles laid down were those of taxation, held the imposition to be a licensing measure, valid under the police power.

Another ferry case was decided about the same time. It was one involving ordinances of the County of Hudson, New Jersey, regulating rates to be charged by ferries plying between Weehawken and New York.[24] The ferries in question were operated by the West Shore Railroad to transfer passengers and freight from its terminus on the New Jersey shore to points on the east shore of the Hudson River in

[24] New York Central & H. R. Ry. *v.* Board of Freeholders of Hudson County (1913) 227 U. S. 248; 57 L. ed. 499.

New York City. The action was brought by the railroad company to restrain the enforcement of the ordinances.

It was the contention of the company that the ordinances were an unwarranted interference with the interstate business of the company and that the enforcement of the ordinances would constitute a direct burden upon interstate commerce. Congressional legislation relative to railroads was cited as covering ferries used by railroads. But even if this were not so, the railroad contended that control of interstate ferriage was so absolutely within the power of Congress as to exclude, even in case of the inaction of Congress, the presumption of state authority to regulate. The county contended that the business of ferriage upon navigable waters constituting a boundary between states was not interstate commerce, that the power to regulate it was not surrendered by the states to the Federal Government, and that, even if Congress had legislated with reference to the railroad passengers and freight, many persons used the ferry who did not use the railroad and that as to these the ordinances were valid. In the opinion, the court pointed out that Congress in 1887 had provided that the term "railroad" should include all bridges and ferries used in connection with any railroad — and all railroads as thus defined were placed under the control of the Interstate Commerce Commission. Chief Justice White, who delivered the opinion, continued:

> The mere fact that such interstate ferries accommodate persons other than railroad passengers does not affect their character as instrumentalities of interstate commerce. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject.

To hold otherwise, it was said, would be to render the national authority ineffective by the confusion and conflict which would result.

The most recent case involving the operation of ferries is *Mayor v. McNeely*.[25] In this action the operator of a ferry between Vidalia, Louisiana, and Natchez, Mississippi, across the Mississippi River, sought to restrain the town of Vidalia from interfering with operation of the ferry. The town replied that the ferry had no license and filed a cross bill for an injunction to restrain its operation. It was brought out in the testimony that the ferry in question had been operated up to 1924 under licenses granted by both Vidalia and Natchez. In that year, however, Vidalia granted a ferry franchise for a ten-year term to the

[25] (1927) 274 U. S. 676; 47 S. C. R. 758; 71 L. ed. 1292.

city of Natchez and designated the identical space formerly used by the plaintiff as a landing place for ferry boats under this franchise. To this McNeely objected and to show his protest refused to apply for a further license, instituting suit to restrain the enforcement of the ordinance on the ground that it was a regulation of interstate commerce in derogation of the jurisdiction of Congress.

The town contended that, consistent with the commerce clause, it might grant or withhold a license to operate such a ferry, guided only by its judgment of what was in keeping with the public interest, and that it might prohibit the operation of the ferry without a license. The argument advanced in support of this contention was that if local auhorities might not control ferriage over boundary streams, by granting or withholding a license, the ferriage would be subject to no restrictions, and the public might suffer from extortionate rates and an absence of provisions for safe carriage and convenient schedules, because the nature of the business and the varying local conditions made it impracticable for Congress to prescribe effective general regulations. Mr. Justice Van Devanter, who delivered the opinion of the court, said in part:

> We think the argument confuses power to license, and therefore to exclude from the business, with power to regulate it . . . The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do.

4. Municipal Regulation of Common Carriers

In a few instances municipal regulation of railroads has been objected to in the United States Supreme Court on the ground of unwarranted interference with interstate commerce, although many of the cases involving this type of regulation have been decided under the contract and due process clauses. In practically every such case the interstate commerce aspects have formed a minor rather than a major element in the decision. For this reason we will defer a full consideration of this topic until the succeeding chapters, except for two opinions which will now be reviewed.

The first of these involved an ordinance of the city of Covington, Kentucky, making numerous requirements as to the equipment and

operation of street railway cars.[26] The street cars in question ran from Cincinnati, Ohio, across the Ohio River into Covington. The ordinance provided that it should be unlawful for a street car company to permit more than one-third greater number of passengers to ride on a car than the seats would accommodate; no passengers were allowed to remain on the rear platform unless a lane were kept clear for passengers to enter and leave the car; no passengers were allowed on the front platform unless the motorman were separated from them by a rail; no one but the motorman was allowed within this rail; cars were to be kept clean and well ventilated; weekly fumigation under direction of the city board of health was required; the car temperature was never to fall below fifty degrees Fahrenheit; and the number of cars to be run was to be fixed by the council. Violations of the ordinance were punishable by fine.

The tracks between Cincinnati and Covington were continuous and connecting. They were laid across a bridge over the Ohio River which Supreme Court had therefore held to constitute an instrument of interstate commerce.[27] The traffic was carried in continuous trips and for a single fare. Under these circumstances, the court held the business to constitute interstate commerce. After referring to numerous instances in which local regulations under the police power had been upheld, notwithstanding their incidental effect upon interstate commerce, the court said:

> We think that the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington, and the number of cars that are to be run in connection with the business there, but also necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there. If Covington can regulate these matters surely Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. Absence of federal regulations does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as those limiting the number of passengers per car and the number of cars to be run.

The other regulations mentioned in the ordinance, however, were held to be proper and as they were separable from the obnoxious sections

[26] South Covington & Cincinnati Street Ry Co. *v.* City of Covington (1915) 238 U. S. 537; 59 L. ed. 350. See also Dillon, J. F., *op. cit.*, vol. III, p. 1979, sec. 1239, for other cases as to police powers over street railways; and McQuillin, E., *op. cit.*, vol. III, p. 2686, secs. 953-955.

[27] Covington, etc., Bridge Co. *v.* Kentucky (1894) 154 U. S. 204; 38 L. ed. 962; 4 I. C. Rep. 649; 14 Sup. Ct. Rep. 1087.

which limited the number of passengers per car and the number of cars to be run, they were held valid.

An interesting body of municipal regulations has grown up in recent years around the business of motor transportation. The operation of a bus line in a municipality does increase traffic congestion, wear out expensive pavements, cause annoying noises and odors and otherwise impair the amenities. Ordinances have been passed to license such vehicles, to require the filing of insurance policies to protect persons who might be injured by the negligence of their drivers, and to prescribe other regulations to reduce the undesirable features of their operation.

Such a licensing and regulating ordinance was brought before the Supreme Court in *Sprout v. City of South Bend.*[27a] This was an appeal from the imposition of a fine for violation of the ordinance, through refusal to apply for and secure the required license. The facts showed that Sprout was not merely a local carrier, doing business only within the city, but also carried passengers to points in Indiana outside of South Bend and also to points in Michigan. He purported to be engaged only in interstate commerce and required all passengers to purchase interstate tickets. But he regularly stopped to discharge passengers from South Bend at points within the state of Indiana. The court pointed out that the legal character of the traffic was not affected by the fare device. The actual facts governed. The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. The court continued:

> It is true that, in the absence of federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of buses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded.

The court pointed out, however, that it did not appear that the fee here provided was an incident to a scheme of municipal regulation, or that the proceeds were applied to defraying the expenses of such regulation: or that the amount collected was no more than was reasonably required for such a purpose. Hence the license fee could not be upheld as a police measure. Inasmuch as there was no suggestion that the

[27a] (1928) 277 U. S. 163; 48 Sup. Ct. Rep. 502; 72 L. ed. 833. See also City of Hammond *v* Schappi Bus Line, Inc. (1927) 275 U. S. 164; 48 Sup. ;Ct. Rep. 66; 72 L. ed. 218; and Same *v* Farina Bus Line and Trans. Co. (1927) 275 U. S. 173; 48 Sup. Ct. Rep. 70; 72 L. ed. 222.

proceeds of the license fees were to be applied to the construction or maintenance of the city streets the tax could not be upheld as an excise for the use of the streets. The court then proceeded to inquire whether the license could be upheld as an occupation tax. Mr. Justice Brandeis said:

> A state may by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.

As the supreme court of Indiana had construed the ordinance as applicable only to buses engaged in interstate commerce it could not be upheld as an occupation tax. Provisions for the filing of liability insurance were held not to be an unreasonable burden on interstate commerce. As the ordinance was void because of the imposition of the license fee no further question as to the ordinance regulations was examined.

The only other decision which properly falls under this head is one concerning the validity of an ordinance of the city of Denver, Colorado, requiring the removal of a railroad side track from a street intersection.[28] The growth of street traffic had made dangerous the continued use of the track for switching for industrial use. The railroad company sought to enjoin the enforcement of the ordinance on the ground that it was repugnant to the commerce clause. The court, however, admitting that a little inconvenience might result from the enforcement of the ordinance, held it valid as a police power regulation.

5. Municipal Regulation of Express Companies[29]

As in the case of railroad regulation, many municipal ordinances dealing with express companies have been attacked on grounds other than repugnance to the commerce clause. These matters will be dealt with in subsequent chapters. Three cases, however, do involve questions of interstate commerce and these will be examined under this heading.

[28] Denver & Rio Grande Railroad Co. *v.* City and County of Denver (1919) 250 U. S. 241; 63 L. ed. 958.

[29] See Dillon, J. F., *op. cit.*, vol. IV, p. 2342, sec. 1360; McQuillin, E., *op. cit.*, vol. III, p. 2263, sec. 1020.

An ordinance of the city of Mobile, Alabama required that every express company having a business extending beyond the limits of the state should pay a license fee of $500; those doing an exclusively intrastate business were required to pay $100; and those doing business only within the city a license of $50. An express company when prosecuted for failure to pay the license contended that such an exaction as that imposed by the ordinance was repugnant to the commerce clause.[30] The ordinance was upheld, but the decision was later expressly overruled.[31]

It is difficult to see how this ordinance could ever have been sustained. Its discrimination against interstate commerce is obvious. This question, however, was not raised on the appeal. It is to the credit of the court that it did not fail to correct its error.

The city of Leavenworth, Kansas had by ordinance imposed a tax upon the business of express companies, carefully excluding that done for the United States and that which was interstate in character. The United States Express Company operated in the city only in connection with the Rock Island Railroad. This railroad entered the city only from the east by a line across the Missouri River which formed the boundary between Kansas and Missouri. All express packages, therefore, passed out of the state of Kansas at the same time that they passed out of the city. Some of these packages, consigned to points in Kansas, reentered the state after a short journey through Missouri and were delivered by the express company to their destinations. The company did no local business in the city and claimed that the attempt to license it would result in an unlawful interference with interstate commerce.[32] The question which was presented was whether or not the business originating at Leavenworth, consigned to points in the state of Kansas, lost its intrastate character by its brief transportation en route in the state of Missouri. The court held that the question was controlled by its prior decision in *Lehigh Valley Railway v. Pennsylvania*[33] in which it was held that a state might tax the receipts of a railroad corporation for the portion of the transportation which was within the state, though it passed over the territory of an adjoining state en route. The court concludes, "We are of the opinion that, for the purpose of a privilege tax for business thus done, the municipality

[30] Osborne *v.* City of Mobile (1873) 16 Wall. 479; 21 L. ed. 470.

[31] Leloup *v.* Port of Mobile (1888) 127 U. S. 640; 32 L. ed. 311.

[32] Ewing *v.* Leavenworth (1913) 226 U. S. 464; 57 L. ed. 303.

[33] (1892) 145 U. S. 192; 36 L. ed. 672; 4 I. C. R. 87; 12 S. C. R. 806.

acting under authority of the state, did not exceed its just power." The fact that the licensing ordinance had expressly excluded government business and interstate commerce was noted and favorably commented upon by the court.

The only remaining case under this heading arose out of a controversy involving an ordinance of the City of New York levying a license tax upon the wagons of an express company.[34] No distinction was made in levying the tax between wagons used in interstate and those used in intrastate commerce. The company showed that a large proportion of its business was interstate in character and requested an injunction against the enforcement of the ordinance so far as it purported to affect its interstate commerce. The court granted the relief sought pointing out that the police power basis claimed for the ordinance did not justify the imposition of a direct burden on interstate commerce. In the course of the opinion Mr. Justice Hughes said, "Local police regulations cannot go so far as to deny right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

6. Municipal Regulation of Telegraph Companies[35]

There is something about the business of telegraphic communication, as well as the express business, which seems to make municipal councils anxious to impose upon it some special tax. These businesses are seldom locally owned, they use little property, and payments made to them for their services seem to take money out of the community instead of bringing it in. They differ from the telephone business, which is a personal service reaching many homes, is a local convenience, is frequently locally owned, and usually has a considerable amount of property which may be taxed for local purposes. Perhaps these reasons for municipal antipathy to the telegraph business do not exhaust the list, but they at least suggest some reasons why cities began early to attempt to devise some special method of taxation for it.

The first method employed was already familiar in other lines of business—the occupation tax. It was a tax of this type which was objected to in the first case on municipal telegraph taxation to reach the Supreme Court.[36] An ordinance of the Port of Mobile levied a license

[34] City of New York *v.* Adams Express Co. (1914) 232 U. S. 14; 58 L. ed. 48.

[35] See Dillon, J. F., *op. cit.*, vol. IV, p. 2347, sec. 1362; McQuillin, E., *op. cit.*, vol. III, p. 2262, sec. 1019.

[36] Leloup *v.* Port of Mobile (1888) 127 U. S. 640; 32 L. ed. 311.

tax upon the local agent for a telegraph company. He objected, maintaining that the telegraph business was interstate commerce and could not be interfered with by municipal regulations.

In its opinion the court held that communication by telegraph was commerce and that as the tax in question was purely one on the privilege of doing the business in which the company was engaged, it was void. It is significant to note that it was shown by the evidence that the telegraph company was paying a general property tax upon its property and a tax upon its gross earnings. The license sought to be imposed would have been an additional tax burden. The court said:

> We will not gainsay that this license tax was imposed as a revenue measure, as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for state or municipal purposes can be derived from the agencies or instrumentalities of commerce no one will contend. The question generally mooted is, how shall this end be attained. We are not prepared to say that a state can prohibit such a company from doing business unless the tax is paid. A state cannot levy a tax upon the interstate business of a telegraph company. A tax on an occupation is equivalent to a tax upon the business carried on.

The next case involving a similar license tax upon telegraph companies arose from an ordinance of the city of Charleston, South Carolina.[37] This ordinance expressly exempted from the business taxed that done for the United States Government and that which was interstate in character. This license, the court said, was nothing more than a tax, the license when issued not being a grant of authority to conduct the business, but only a receipt for the tax. So construed, with the exemptions noted, the tax was held valid. The court answered the company's claim of hardship in paying the tax by referring to it to the state legislature for redress.

Several years later a similar license ordinance of the city of Talladega, Alabama, was drawn in controversy.[38] In this case the ordinance also levied the tax upon the intrastate business of the company, but failed to exempt business done for the United States. This omission, the court held, was fatal to the validity of the ordinance. In the same case the company showed that it had done its intrastate business at the city of Talladega during the year for which the license was charged at a loss. It suggested that any deficit, and the amount of the license, if paid, must come out of revenue from interstate business.

[37] Postal Tel. Cable Co. *v.* City of Charleston (1894) 153 U. S. 692; 38 L. ed. 871.
[38] Williams *v.* City of Talladega (1912) 226 U. S. 404; 57 L. ed. 275.

The court, however, rejected the implication, stating that the test proposed, of any single twelve months' period, was not a sufficiently accurate representation of the business of the company to render the tax void. In this case, too, came the first claim of federal privileges under the post roads act of 1866. The court pointed out that this legislation was merely permissive and conferred no corporate rights and privileges to occupy the streets free from state interference.[39]

The reasoning of the court in the last three cases reviewed leads to logical difficulties which a hypothetical illustration will serve to demonstrate. A city under proper state authority enacts an ordinance levying a license tax of $100 on the telegraph business. Finding this ordinance to be invalid because of failure to discriminate between intrastate and interstate business it amends the ordinance to exempt the latter, but leaves the license fee the same. Similarly it may amend the ordinance to exempt government business, but unless the fee is reduced the burden is just as onerous and the revenue of the city is in no way impaired. License fees for occupation taxes usually are of this nature—namely, fixed in an arbitrary lump sum—rather than being based upon some percentage of the revenue of the portion of the business taxed. Thus the interposition of the federal courts in such cases is little more than a technical victory for the telegraph companies.

The seemingly precarious nature of license taxes upon telegraph companies under the commerce clause led cities to look for new devices for the taxation of this business. The next method used was that of charging the telegraph company a rental for the use of the streets by its poles.[40]

The first case of this nature arose from an ordinance of the city of St. Louis which imposed a tax of $5.00 per pole per year as a rental.[41] The court at once recognized this charge as a rental, partaking of none of the characteristics of a privilege tax or license. Mr. Justice Brewer in the opinion said, "While permission to a telegraph company to occupy the streets is not technically a lease, yet it is the giving of the exclusive use of real estate for which the giver has the right to exact compensation." Acceptance by the company of the privileges of the Act of Congress of 1866 was held to give no rights upon

[39] In City of Richmond *v.* Southern Bell T. & T. Co. (1899) 174 U. S. 761; 43 L. ed. 1162, the court held that this act could not be applied to telephone companies.

[40] See McQuillan, E., *op. cit.*, vol. II, p. 1683, sec. 783.

[41] City of St. Louis *v.* Western Union Telegraph Co. (1893) 148 U. S. 92; 37 L. ed. 380.

the property of the state. The principle having been thus upheld, the case was remanded for a jury trial of the issue as to the reasonableness of the amount of the fee. A rehearing was denied[42] and upon trial the fee was found to be excessive. This finding was affirmed upon appeal.[43]

The principle of a pole tax having been thus upheld, other cities were quick to take advantage of this promising new source of revenue. A similar rental charge by the city of Baltimore, of $2.00 per pole, was upheld upon the authority of the St. Louis case.[44] These cities were both held to have been authorized to enact ordinances imposing such rentals. Soon, however, other cities with more restricted powers began to attempt to deal with the problem in a similar manner. At once, difficulties were encountered.

The borough of New Hope, Pennsylvania, which had general police powers, passed an ordinance requiring the payment of $1.00 per pole and $2.50 per mile of wire by all telegraph companies owning such facilities within the borough. Payment of this charage was refused by a telegraph company and suit was brought by the borough to collect the fees for four years.[45] A jury in the trial court gave a verdict for the amount claimed by the borough. Upon appeal the company contended that the amount of the fee could not be justified under the police power and hence that the charge was a burden upon interstate commerce. The court, however, held that as the license fee was not a tax upon the property of the company, or on its transmission of messages, or on its receipts from such transmission or upon its occupation or business, but was a charge to defray the cost of local government supervision, it was not in itself obnoxious to the commerce clause.

But in 1899, the borough brought action against a different telegraph company, under the same ordinance to recover the amounts due thereunder.[46] In this case, the jury in the trial court awarded the borough a less sum than what would have been legally due under the ordinance. The company presented an elaborate argument claiming

[42] City of St. Louis *v.* Western Union Telegraph Co. (1893) 149 U .S. 465; 37 L. ed. 810.

[43] City of St. Louis *v.* Western Union Telegraph Co. (1897) 166 U. S. 388; 41 L. ed. 1044.

[44] Postal Telegraph Cable Co. *v.* City of Baltimore (1895) 156 U. S. 210; 39 L. ed. 399.

[45] Western Union Telegraph Co. *v.* Borough of New Hope (1903) 187 U. S. 419; 47 L. ed. 240.

[46] Postal Telegraph Cable Co. *v.* Borough of New Hope (1904) 192 U. S. 55; 48 L. ed. 338.

that the charges under the ordinance were unreasonable and that the borough had never spent any part of the amount collected in inspection services as would be contemplated in a valid police regulation. The court, however, ignored these contentions and held that the action of the jury in awarding a sum less than that called for by the ordinance was an indictment of the ordinance fees as unreasonable. The ordinance was therefore held void.

In the interim between the decisions in the New Hope cases, the Supreme Court considered a similar police regulation of the city of Philadelphia.[47] In this case the city sued the company for license fees for six years. The jury awarded the city the amount claimed in full. The company claimed that the charges could not be justified as police regulations. The court in discussing the question said:

> The tax sought to be collected in this case was not in the nature of a tax upon the franchise or property of the company, nor of a rental for the occupancy of the streets. Neither was it a charge for the privilege of engaging in interstate commerce, but it was one for the enforcement of local governmental supervision. If a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify at the hands of any municipality a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such service for nothing and may, in addition to the ordinary property taxation, subject the corporation to a charge for the expense of supervision.
>
> But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True it is often said that a license tax is, in its nature, arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed, or its profitableness. But such observations are pertinent only when the license is resorted to for the purpose of revenue. When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and if it were possible to determine in advance the exact cost, that would be the limit of the charge. In the nature of things, that is ordinarily impossible; and so the municipality is at liberty to make the charge enough to cover any anticipated reasonable expenses. It is authorized to make such charge in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual erpenses of the supervision; nor can the licensee then recover the difference between the amount of the license and such cost.

[47] Atlantic & Pacific Telegraph Co. *v.* City of Philadelphia (1903) 190 U. S. 160; 47 L. ed. 995.

With this summary of the principles which should be observed in fixing the amount of license fees imposed in support of police regulations, the court remanded the case for a jury determination of the reasonableness of the fees involved, observing that fees reasonable in one community may be oppressive and unreasonable in another.

Two cases involving the validity of an ordinance of the city of Richmond, Virginia, which levied a tax of two dollars per pole upon telegraph companies, also appear among the decisions. The first of these was an appeal from a decree dismissing a bill for a writ of injunction against the enforcement of the ordinance.[48] Here again the court held that the company acquired no license from the Federal Government under the post roads act of 1866 and found the ordinance to be a valid measure. The acquiescence of the company in the imposition of the charges as evidenced by payment of them for many years was held practically to estop the company to object.

The second case arose in a similar manner upon almost identical facts, but involved a different company.[49] Here, too, both an annual license of $300 and a tax of $2.00 per pole were imposed. Business done for the United States Government and that which was interstate in its character was exempt. The company alleged that, as the cost of doing intrastate business at Richmond was greater than the revenue therefrom, the license was a burden upon the interstate business of the company and hence void.

Upon the authority of its previous decisions the court held the taxes valid, as the local business was so substantial in its amount that it did not clearly appear that the tax was a disguised attempt to tax interstate commerce. The court said:

> "Even if the net returns from the intrastate business should not equal such tax, and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way, in this case for its right of way and the expense to others incident to the use of it. This compensation should also include the expense of inspection. . . . The amount charged in this case does not seem excessive for the service which should be rendered.

[48] Western Union Telegraph Co. *v.* City of Richmond (1912) 224 U. S. 160; 56 L. ed. 710.

[49] Postal Telegraph Cable Co. *v.* City of Richmond (1919) 249 U. S. 252; 63 L. ed. 590.

A case involving a similar ordinance and presenting one new point arose from the city of Little Rock, Arkansas.[50] The new point was whether or not, by an extension of the city limits, poles formerly outside of the limits but brought within the city by annexation could lawfully be subjected to municipal taxation under an ordinance enacted before the change in limits. The ordinance was held to have been extended by the change in boundary over the new territory equally with that formerly constituting the city and the company was required to pay the tax on the additional poles. A tax of fifty cents per pole for all located within the city whether on public or private property or railroad right of way was held reasonable and valid.

The most recent case on this subject involved a consideration of an ordinance of the city of Fremont, Nebraska, passed in 1907, imposing a license of $60.00 per year on telegraph companies.[51] The company paid the tax for eleven years but then resisted payment on the ground that it was a burden on interstate commerce. The company claimed that its expenses in carrying on its intrastate business at Fremont exceeded the revenue for the years for which the city sought to recover, and also that the tax was in excess of a reasonable rental for the use of the streets. The court, however, held the tax not *prima facie* excessive and stated that until the whole of the intrastate business of the company showed a loss, its loss at one station was immaterial. It was pointed out that under the statutes, if a loss were sustained, application could be made to the state public service commission for an increase in rates. The ordinance was upheld.

7. Municipal Control Over Imported Goods[52]

Another field in which the commerce clause has been invoked to limit the powers of municipalities is that of the importation of goods or merchandise into the state. The basic principles governing this subject were laid down by the Supreme Court in *Brown v. Maryland*.[53] In this case the State of Maryland had enacted a law under which all importers were to pay a license tax of fifty dollars per year. No goods

[50] Mackay Telegraph & Cable Co. *v.* City of Little Rock (1919) 250 U. S. 94; 63 L. ed. 863.

[51] Postal Telegraph Cable Co. *v.* City of Fremont (1921) 255 U. S. 124; 65 L. ed. 545. For comment see Powell, T. R., 20 Mich. L. Rev. 146-7 (1921).

[52] See Dillon, J. F., *op. cit.*, vol. IV, p. 2319, sec. 1355; McQuillin, E., *op. cit.*, vol. II, p. 1666, sec. 774.

[53] (1827) 12 Wheat. 419; 6 L. ed. 678.

imported by any person were to be sold unless the license fee had been paid. The case arose through an indictment of Brown for selling imported goods without having secured the license. He contended in his appeal that the state law was invalid because it levied an impost or duty upon imports, which was not necessary for executing its inspection laws, without the required consent of Congress, and because it was repugnant to the exclusive power of Congress over foreign commerce. The court upheld both objections, pointing out that a tax upon the importer was in effect a tax upon imports, that if the states could tax imports without congressional consent they might entirely stop importation into the state. Chief Justice Marshall, in the course of the opinion, took occasion to describe the point in the process of importation at which the jurisdiction of the states might attach as follows:

> When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the constitution.

This portion of the opinion is frequently referred to in later cases as the "original package" doctrine which, with some modification, has been followed consistently in construing municipal ordinances.

The court also adopted the contention of counsel for Brown that the importer purchases, by payment of duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country. The court through Chief Justice Marshall said:

> The object of importation is sale; it constitutes the motive for paying the duties. The manner of selling may be regulated. The payment of duties gives no right to a special method of sale such as by auction or as an itinerant peddler. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce. . . . If the states may tax all persons and property within their territory, what shall restrain them from taxing goods in their transit through the state, or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? It may be proper to add that we suppose the principles laid down in this case to be applicable equally to importations from a sister state.

Evidently he wished to settle, so far as possible, the whole question of state taxation of objects of interstate and foreign commerce and to set up legal barriers against the power of the states to burden or interfere.

It was some time after *Brown v. Maryland* before the Supreme Court began to apply the original package doctrine to interstate commerce. One of the chief impediments to the transfer of this doctrine by analogy from the foreign to the interstate field was the concept of the payment of duties as purchasing the right from the Federal Government to sell the imported article. When the application was finally made in interstate commerce, a different rule was built up as to the police power of the states than that set up for the applicability of the taxing power with respect to objects moving in interstate commerce. The power to tax is now held to be applicable as soon as the goods come to rest in the state, but the police power may not be applied until the original package is broken or sold. The only difference, then, between the interstate and foreign commerce original package rules is in reference to taxation.

Since the decision in *Brown v. Maryland*, the Supreme Court has had frequent occasion to examine the principles laid down therein in considering cases involving state laws.[54] In a few instances the court has considered municipal ordinances which were claimed to conflict with the commerce clause as interpreted by Chief Justice Marshall in this "original package" decision.

The first of these arose from an attempt to enforce an ordinance of the city of Mobile, Alabama, imposing a license tax of one-half of one per cent on the sales of all traders.[55] Exemption from the tax was claimed by Moses Waring, a trader, on the ground that he was an importer. He purchased from the consignees, before unloading, whole cargoes of vessels from foreign ports, attending to the unloading and selling himself. The court, however, said that the original consignees and not Waring were the importers. The ordinance was held valid as to him because merchandise in the original packages once sold by the importer, becomes taxable as other property.

In the same year another ordinance of the city of Mobile was brought in question.[56] Under charter authority the city imposed a license upon auction sales. Woodruff sold, as an auctioneer and commission merchant, a large amount of goods for others and also on his own account and claimed that as to such goods as were brought into

[54] License Cases (1847) 5 How. 504; 12 L. ed. 256; New York *v.* Miln (1837) 11 Pet. 102; 9 L. ed. 648; Passenger cases (1849) 7 How. 283; 12 L. ed. 702.

[55] Waring *v.* Mobile (1869) 8 Wall. 110; 19 L. ed. 342.

[56] Woodruff *v.* Parham (1869) 8 Wall. 123; 19 L. ed. 382.

the state from other states and sold by him in the original and unbroken packages, he was not liable to pay the tax imposed by the ordinance.

The court explained that the constitutional prohibition on the levy of duties applied only to foreign commerce and could not be applied to commerce between the states. A tax of the kind imposed by the ordinance was held valid. It was pointed out, however, that a similar tax, disicriminating against the products from other states, by levying a tax upon them and not upon domestic goods or at a higher rate, would be violative of the commerce clause.

An ordinance presenting such a discriminatory aspect was before the court soon thereafter.[57] In this case the city of Alexandria, Virginia, had passed an ordinance imposing a license tax of $200 on all agents or dealers in ale or beer by the cask, not manufactured in Virginia but brought there for sale. In an action to recover the amount of the license the defendants pled immunity under the commerce clause from taxation of the type imposed by the ordinance. But because of their failure to establish in the record the fact that the ale or beer sold by them was brought into Virginia from another state, the court held that the goods in which they dealt might have been manufactured elsewhere in the state. If proper facts had existed and had been properly established, there is little doubt that this ordinance would have been held invalid.

A short time afterward, the tax collector of the city and county of San Francisco, California, assessed for state and local taxation certain wines which had been imported from France and stored in the original packages in the warehouse of the importers in the city.[58] The tax was paid under protest by the importers and suit was brought against the tax collector to recover the amount. Mr. Justice Field, who delivered the opinion of the court, said:

> The goods imported do not lose their character as imports until they have been sold by the importer or have been broken up by him from their original cases. While retaining their character as imports, a tax upon them in any shape is within the constitutional prohibition. The fact that the tax imposed is no greater than that imposed upon other property in the state is immaterial.

A refund of the tax was ordered.

While a number of cases involving the meaning of the term "original package" have been decided in the Supreme Court, most of them

[57] Downham *v.* Alexandria (1870) 10 Wall. 173; 19 L. ed. 929.
[58] Low *v.* Austin (1872) 13 Wall. 29; 20 L. ed. 517.

have construed state laws.[59] Only one has been found which turns upon the attempt of a city to tax. This case concerned an assessment for taxation for city purposes of certain merchandise owned by a dry goods firm in the city of New Orleans.[60] The company claimed that all goods imported by it had been stored and sold by it in the original packages in which they had been imported. It was developed by the testimony that the importations had been made in large boxes or bales containing a number of smaller boxes or bundles of goods. The company had opened the larger packages and stored the smaller ones on their shelves and sold them without opening them. They claimed that the smaller packages were just as much original packages as the larger ones. The Supreme Court rejected this contention pointing out that to favor such a practice would result in a wholesale tax evasion by all merchants importing goods from foreign countries, provided they were careful to have the foreign manufacturer pack them properly. This would result in a perference in taxation for foreign goods at the expense of domestic manufacturers. The court said:

> In our judgment, in the present case the plaintiffs had so acted upon the goods imported as to incorporate them into the general mass of property in the state. In our judgment, the original package in the present case was the box or case in which the goods were shipped, and when the box or case was opened for the sale or delivery of the separate parcels, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits.

A license ordinance of the city of Mobile imposing an annual charge upon the business of buying and selling beer in kegs was challenged on the ground that it was an unlawful restraint of interstate commerce when applied to a business in which the beer was bought in another state, shipped to the wholesaler in Mobile, stored by him in his warehouse and sold and delivered to the retailer in the same "original package" or keg.[61] The Wilson Act, which had subjected intoxicating liquors to the police laws of the states, was said by the wholesaler to be inapplicable as he considered the ordinance to be an exercise of the taxing power rather than the police power. The court, however, adopted a contrary view, holding the ordinance to be a proper police measure and as such to have been authorized by the Act

[59] For an explanation of what constitutes an "original package" and citations to cases affecting state laws see 5 R. C. L. 709-711; also 12 C. J. 31, sec. 28 (2).

[60] F. May & Co. *v.* New Orleans (1900) 178 U. S. 496; 44 L. ed. 1165.

[61] Phillips *v.* City of Mobile (1908) 208 U. S. 472; 52 L. ed. 578.

of Congress. The fact that the city derived more or less revenue from the operation of the ordinance was held not to prove that the ordinance had not been adopted in the exercise of the police power, even though it might also have been an exercise of the power to tax. The court said:

> Taxation is frequently the very best and most practical means of regulating this kind of business. Even where the subject of transportation is not intoxicating liquor, the court has held that goods brought in the original packages from another state, having arrived at their destination and being at rest there, may be taxed without discrimination like other property within the state, even while in the original packages in which they were brought from another state.[62]

The sentence last quoted may seem to be inconsistent with the court's position in the San Francisco case reviewed above, but it must be borne in mind that importation from a foreign counrry is not considered by the court to be of the same character as importation from another state. As a matter of fact the difference is so important that it was a long time before the Supreme Court made any attempt to apply the original package doctrine to interstate commerce. The chief difference is, of course, that imported goods pay duty to the United States Government under the tariff acts, while goods moving in interstate commerce do not. Reference to the case of *Brown v. Maryland* shows that one argument relied upon by Chief Justice Marshall was that in paying these duties the importer had purchased a right to dispose of the imported goods, and, as that right was one which he derived from the central government, no state might be permitted to abrogate it through the taxing power. This may have been considered reason enough for denying the right to tax goods imported from foreign countries while stored in the original packages in the warehouse of the importer and permitting the taxation of importations from another state when similarly situated. It should be pointed out, however, that there are many classes of commodities upon which no import duty is charged, so this argument is weakened.

8. Municipal Regulation of Agents and Peddlers[63]

Municipalities are frequently importuned by local merchants and manufacturers to enact some sort of ordinance imposing a license tax

[62] American Steel & Wire Co. v. Speed (1904) 192 U. S. 500; 48 L. ed. 538.

[63] On this topic see Garnett, C. B., 2 Va. L. Rev. 415 (1915). Also Dillon, J. F., *op. cit.*, vol. IV, p. 2322, sec. 1356; 12 C. J. 105, sec. 145; McQuillin, E., *op. cit.*, vol. II, p. 1667, secs. 775-778.

or other regulation upon solicitors and agents for non-resident firms who take orders for goods and send these to the non-residents to be filled and delivered. Such ordinances are almost invariably invalid. State constitutional requirements of uniformity of taxation and the common law rules against discrimination and undue restraint of trade usually are sufficient to invalidate such legislation so far as it relates to intrastate commerce; and the decisions of the Supreme Court show a disposition to hold such regulations invalid so far as they affect interstate commerce.

The city of Chicago enacted an ordinance imposing a special tax of two per cent upon all premiums collected by foreign insurance companies doing business in the city. The payment of the tax was resisted on the ground that the ordinance was a discrimination against interstate commerce.[64] The business of insurance was held in *Paul v. Virginia*[65] was held not to constitute commerce. The ordinance was, therefore, adjudged not to conflict with the commerce clause.

Several years later a railroad agent in the city of San Francisco resisted the payment of a license levied upon railroad agencies.[66] It was the duty of this agent to solicit business for his road, the New York, Lake Erie & Western, which maintained a line between Chicago and New York. The court considered his duties as one means adopted by the company to increase interstate passenger traffic. "The tax upon it, therefore, was a tax upon a means or an occupation of carrying on interstate commerce pure and simple." The state contended that the implied prohibition against interference with interstate commerce applied only to commerce between the interfering and other states, but the court held that it applied as well to commerce wholly between other states. The license was held void as applied to the agent who was party to this suit.

This decision was followed in a similar case involving a tax by the city of New Orleans upon steamship agents.[67] The company concerned was regularly employed as an agent for four steamship companies, engaged in interstate and foreign commerce, under a contract fixing its compensation upon the basis of commissions upon the gross

[64] Ducat *v.* City of Chicago (1871) 10 Wall. 410; 19 L. ed. 972. See also McQuillin, E., *op. cit.*, vol. III, p. 2264, sec. 1021.

[65] (1869) 8 Wall. 168; 19 L. ed. 357.

[66] McCall *v.* California (1890) 136 U. S. 104; 34 L. ed. 391. See also McQuillin, E., *op. cit.*, vol. II, p. 1675, sec. 780.

[67] Texas Transport & Terminal Co. *v.* City of New Orleans (1924) 264 U. S. 150; 44 S. C. R. 242; 68 L. ed. 611.

amount of freight charges collected. Mr. Justice Sutherland, in delivering the opinion of the court said:

> It is a well established rule that a state or municipality is powerless . . . to impose a tax upon persons for securing or seeking to secure the transportation of freight of passengers in interstate or foreign commerce.

The leading case on the taxation of peddlers and agents involves a special act of the Tennessee legislature applying to the Taxing District of Shelby County (now the city of Memphis.) [68] A traveling salesman for a firm at Cincinnati, Ohio, was arrested and fined for pursuing his business within the taxing district without having first obtained a license. His defense was that as applied to him the ordinance imposed an unconstitutional burden upon interstate commerce. Mr. Justice Bradley in the opinion of the court said:

> The Constitution having given to Congress the power to regulate commerce, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. Where the power of Congress is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions; and any regulation of the subject by the states, except on matters of local concern only, is repugnant to such freedom. The only way in which commerce between the states can be affected legitimately by state laws is when, by virtue of its police power, a state provides for the security of the lives, limbs, health and comfort of persons, and the protection of property, or when it does those things which may only incidentally affect commerce.
>
> This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. This shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. If the selling of goods by sample and the employment of drummers for that purpose injuriously affects the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulation should be based upon a uniform system applicable to the whole country.[69]

Chief Justice Waite and Justices Field and Gray dissented from the opinion of the court. In his dissenting opinion, the Chief Justice said:

> The Constitution gives the citizens of each state all the privileges and immunities of citizens in the several states, but this certainly does not guarantee to those who are doing business in states other than their

[68] Robbins *v.* Taxing District (1887) 120 U. S. 489; 30 L. ed. 694.

[69] For another case with similar facts and conclusion see: Stoutenburgh *v.* Hennick (1889) 129 U. S. 141; 32 L. ed. 637.

> own immunities from taxation upon that business to which citizens of the state where the business is carried on are subjected. I am unable to see any difference between a tax upon a seller by sample and a tax upon a peddler; and no one would question the justice and legality of a tax upon peddlers even though they come from other states.

The law has been established on the majority opinion, but the dissent suggests that the answer to the question was not a clear one.

In another case involving the law of the Taxing District of Shelby County, Tennessee, the act was held valid as to commercial agents and merchandise brokers who had rented a room for the purpose of keeping and exhibiting samples and carrying on correspondence with their principals.[70] This case was distinguished from *Robbins v. Taxing District* on the ground that in the Robbins case the tax was in effect upon the principals, while in this case the tax was upon the local business. But in *Texas Transport & Terminal Co. v. City of New Orleans*[71] the court says that this latter case depended upon the fact that the complainants had already secured a license, and had thereby bound themselves to pay a percentage tax on their commissions.

There would seem to be some justification for the use of the police power in licensing and regulating agents and solicitors for non-residents. But even when such a purpose is averred, the Supreme Court seems inclined to ignore it and bases the objection upon its "real purpose" namely, restraint of interstate commerce. This was the situation in a case which was appealed from the Supreme Court of Pennsylvania involving the validity of an ordinance of the city of Titusville.[72] The state courts had held valid as a proper exercise of the police power an ordinance imposing a license tax upon persons soliciting orders for pictures and picture frames in the city. The agent, upon receiving orders, forwarded them to Chicago, where the goods were made and shipped to the purchasers C. O. D. In the opinion, Mr. Justice Brewer said in part:

> The question in this case is whether a manufacturer of goods which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state, can send an agent into another state to solicit orders for the product of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods. The tax in question is a restriction upon the right to

[70] Ficklen *v.* Taxing District of Shelby County (1892) 145 U. S. 1; 36 L. ed. 601.
[71] (1924) 264 U. S. 150; 44 Sup. Ct. Rep. 242 68 L. ed. 611.
[72] Brennan *v.* City of Titusville (1893) 153 U. S. 289; 38 L. ed. 719.

> sell and a burden upon the lawful commerce between the citizens of two states. Even the police power cannot be used as a blind under which to regulate commerce between the states.

Another picture and picture frame agent operating in North Carolina was arrested in the city of Greensboro for a violation of an ordinance of that city requiring such persons to secure licenses.[73] In this case two facts were relied upon by the city to distinguish it from *Brennan v. Titusville*. The first was that the pictures and frames were shipped separately and the pictures were placed in a frame after one had been selected from among several samples by the purchaser. This was thought to constitute an essential part of the manufacture of the product. The second fact was that the goods were shipped to the agent, not to the customer. The court, however, in its opinion refused to recognize either of these points as adequate to distinguish the case. The opinion, which was delivered by Mr. Justice Shiras, reads in part as follows:

> Though the pictures and frames were shipped separately in this case, the incompleteness of the pictures cannot remove them from their character as subjects of interstate commerce. Nor does the fact that they were shipped to an agent of the company instead of the purchasers affect the interstate character of the transaction. The vendor used two instead of one agent in the delivery. It cannot escape observation that efforts to control commerce of this kind, in the interest of the states in which the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have heretofore been rendered fruitless by the supervising action of this court.

The original package doctrine was made the basis for a contention that a licensing ordinance of the Borough of Sunbury, Pennsylvania, was valid when applied to an agent to whom orders were shipped in bulk.[74] In this case it was shown that the defendant was an agent for an Ohio grocery corporation to solicit orders in Pennsylvania. When a large number of orders had been received, they were filled at the company's place of business in Ohio and shipped to the agent, each order being wrapped and labeled with the name of the customer, except brooms, which were wrapped together. The agent delivered the goods to the customer receiving cash therefor, which he forwarded, together with any goods refused as not being the same as the sample, to the company. The state recognized that to all parts of the transac-

[73] Caldwell *v.* North Carolina and City of Greensboro (1903) 187 U. S. 622; 47 L. ed. 336.

[74] Rearick *v.* Pennsylvania (1906) 203 U. S. 507; 51 L. ed. 295.

tion, except the brooms, the immunity of an interstate transaction must apply. The court, however, held that the brooms, too, were subjects of interstate commerce.

> The original package doctrine does not apply where the sale was made before the goods entered the state. The order taken by the agent was an executed contract of sale. The brooms were specifically appropriated to specific contracts. The transaction was interstate commerce, and within the protection of the commerce clause.

An agent for a lightning-rod manufacturer in St. Louis, Missouri, was arrested in Waycross, Georgia, for failure to secure a license before erecting lightning rods on a house within the city.[75] He claimed immunity from the payment of a license fee under the interstate commerce clause. The lower court held that he was liable and the Supreme Court followed this view, saying:

> We are of the opinion that the court below was right in holding that the business of erecting lightning rods . . . was within the regulating power of the state, and not the subject of interstate commerce for the following reasons: (a) because the affixing of lightning rods to houses was a carrying on of a business of a strictly local character peculiarly within the exclusive control of state authority; (b) because such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated.

The distinction between local commerce and interstate commerce is well drawn in a case which involved the validity of a license of the city of Covington, Kentucky, upon the peddling of soft drinks.[76] The plaintiff was a manufacturer of soft drinks in the city of Cincinnati, Ohio. He brought bottled soft drinks across the Ohio River to Covington by truck and sold them by the case to retail dealers in Covington. In some cases he delivered goods which had been ordered in advance, but most of his sales were made from his truck. He sought to have an ordinance levying a license tax upon such business declared void as to him on the ground that he was engaged in interstate commerce. Mr. Justice Pitney in delivering the opinion of the court said:

> It is indisputable that, with respect to the goods occasionally carried by the plaintiff in response to orders previously received, he is engaged

[75] Browning *v.* City of Waycross (1914) 233 U. S. 16; 58 L. ed. 828.

[76] Wagner *v.* City of Covington (1919) 251 U. S. 95; 64 L. ed. 157. For brief comment see Powell, T. R., 19 Mich. Law Rev. 31.

> in interstate commerce, not subject to the licensing power of the Kentucky municipality. That part of plaintiff's business which is regulated is that of a peddler or itinerant vendor. When this court is called upon to test a state tax by provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the taxes applied and enforced. It has been settled by repeated decisions of this court that a license regulation or tax of this nature imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce. . . . Of course, the transportation of plaintiff's goods across the state line is of itself interstate commerce, but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that the plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce, and this being so, they cannot claim immunity from local regulation, whether the goods remain in the original packages or not.

In *Watters v. People*[77] a canvasser was arrested for selling goods without a license. Much the greater part of his business was admittedly interstate commerce. But in the course of his business he did sell a few articles which were at rest in the state before the sale. The Supreme Court of the state sustained his conviction. He appealed on the ground that his status in interstate commerce should be determined by the general course of his business, not by an isolated transaction. The Supreme Court refused to disturb the judgment of the state court, declaring that the plea involved an interpretation of the ordinance, which was the province of the state courts.

In a recent case involving a licensing ordinance of the city of Portland, Oregon, the United States Circuit Court of Appeals held valid a tax upon solicitors in accepting a small cash payment as their compensation became thereby peddlers engaged in local trade.[78] But the Supreme Court held the ordinance void. Mr. Justice McReynolds, who delivered the opinion, said in part:

> We cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause. The negotiation of sales of goods which are in another state for the purpose of introducing

[77] (1918) 248 U. S. 65; 63 L. ed. 129.

[78] Real Silk Hosiery Mills *v.* City of Portland (1925) 268 U. S. 325; 45 Sup. Ct. Rep. 525. 69 L. ed. 982.

them into the state in which the negotiation is made is interstate commerce. Manifestly no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittances from it. We are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce.

9. Miscellaneous Municipal Regulations

The city of St. Louis, Missouri, had levied a license tax upon manufacturers, proportioned according to the sales made by such manufacturers during the preceding year. There was ample authority for the passage of the ordinance, but one manufacturer brought suit to recover taxes paid under it on the ground that as a large portion of the product of this factory was sold to persons in other states, the ordinance was a burden on interstate commerce and hence was void.[79] The state supreme court held the tax valid.

The payment of the tax was made a condition of continuing the manufacture of goods within the city and not a condition of selling goods in interstate or any other kind of commerce, although the tax did not accrue until the goods were sold. The Supreme Court held that the ordinance was a regulation of manufacturing and not of commerce, and that manufacturing was not commerce, although its products might become subjects of commerce. The mere fact that the city measured the tax upon the amount of goods sold instead of upon the amount manufactured was held to be nothing of which the company could complain.

One of the most fanciful cases involving the question of interstate commerce is one which arose from Kansas City, Missouri, over a controversy as to the validity of certain tax bills issued in payment for a public improvement.[80] It was urged that the specification of Trinidad Lake asphalt in the improvement ordinance was in violation of the commerce clause. The argument was that Trinidad Lake asphalt was a product of a foreign country, that there were deposits in the United States from which a suitable asphalt could have been had, hence the

[79] American Manufacturing Co. *v.* City of St. Louis (1919) 250 U. S. 459; 63 L. ed. 1084.

[80] Field *v.* Barber Asphalt Paving Co. (1903) 194 U. S. 618; 48 L. ed. 1142. See also McQuillin, E., *op. cit.*, vol. II, p. 1664, sec. 772.

specification of this kind of asphalt was an interference with and a regulation of interstate commerce.

The court, ignoring the frivolous character of the plea, gravely pointed out that this would hardly be a sufficiently direct interference with interstate commerce to warrant the interposition of the Supreme Court. It said, through Mr. Justice Day:

> The right to provide for this type of paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that body; they saw fit to choose Trinidad Lake asphalt. Their right to do so, notwithstanding that competitive bidding was thereby rendered impossible was upheld by the Supreme Court of Missouri. With the wisdom of this choice the courts have nothing to do.

Summary and Conclusions[81]

The grant of authority to Congress in Article I, Section 8, of the Constitution to regulate foreign and interstate commerce did not *ipso facto* exclude the states (including municipalities) from the entire field. The states and cities may still enact laws under their police power, taxing power, and power of eminent domain, which have an incidental though direct effect upon such commerce. And when Congress has not acted upon a subject which does not demand a single uniform national rule, the states and cities may legislate upon such subject until Congress occupies the field. The examples include ferriage, wharfage, and pilotage laws, and regulations as to the use of bridges over navigable waters.

A city may not, however, divert water from a navigable stream or lake in excess of that authorized by the War Department even when thought necessary for the welfare of the locality. It may not tax vessels engaged in navigating United States waters for the privilege of entering a port, although it may tax such boats and other instrumentalities of commerce as property at the same rate as other property in the city and state, if they have a taxable situs within its jurisdiction.

Where a city has erected a wharf at public expense, it may make a reasonable charge for use of it by vessels engaged in interstate and foreign commerce. Such charge must, however, be the same for every boat. No discrimination may be made between those carrying domestic and those transporting foreign commerce. The question of the reasonableness of a wharfage charge is one of common law and presents no

[81] See also, Burdick, C. K., *The Law of the American Constitution*, pp. 246-254.

federal question under the commerce clause. There is no necessary relation between the cost of a wharf and the charge which may be lawfully made for its use. Police regulations affecting the use of wharves by vessels are not an infringement upon congressional power over commerce.

A city tax upon ferry boats is valid when laid upon vessels having a taxable situs in the city, but not when levied upon boats which merely touch there. A license fee, as distinguished from a tax, may never be imposed upon an instrumentality of interstate commerce, where the payment of the fee is made a prerequisite to the lawful conduct of the business. A city may not make its consent a condition precedent to the lawful conduct of interstate commerce. Ferry rates may be regulated by a municipality except in the case of ferries operated in connection with railroads which have been placed under the jurisdiction of the Interstate Commerce Commission. Other regulations may also be valid, such as schedules of trips and provision of safeguards for passengers, but these must be reasonable.

Ordinances regulating the operation of street railway cars in the interests of public health and safety are valid even when applied to interstate trips. But the city may not prescribe the number of cars to be run or the number of passengers which may be carried in one car operated in a continuous interstate journey. A railroad side track may be ordered removed from a busy street intersection in the interests of public safety without infringing upon the commerce clause.

Express companies may be taxed upon their intrastate business, if interstate and Federal Government business is excluded. Their business is intrastate in character and subject to taxation even if, in transportation between two points in one state, it may traverse for a short distance the territory of another state. A license tax upon the wagons of an express company is invalid if it injuriously affects the interstate business of the company or impedes or hinders it.

Similar rules as to taxation apply to telegraph companies. Only intrastate business may be taxed. But a license fee which is greater than the profits from the business of the company at the city levying it is not *prima facie* invalid simply because it may cause the fee to be paid from the profits of interstate business. Similarly a single year's experience is not conclusive. But if the local business is not of substantial amount, a tax may be held invalid as a disguised attempt to tax interstate commerce. A reasonable charge may be made as rental for the

use of the streets by the poles and wires of a telegraph company. Poles brought within a city by annexation are subject to tax under a prior ordinance of the city. But the amount charged, if levied under the police power for regulatory purposes, may not exceed greatly the amout to be expended by the municipality for such regulation. An award by a jury of a sum less than that which would be due if an ordinance is valid is *prima facie* evidence of unreasonableness in the amount charged under the ordinance.

Goods brought into a state in foreign commerce may not be taxed while they remain the property of the importer if they are not taken from the original packages in which they were imported. They lose their character as imports when the original packages are broken or when they are sold by the importer. A somewhat illogical difference has been worked out between imports in foreign commerce and "imports" in interstate commerce. In the latter, the "imports" may be taxed as soon as they have come to rest at the end of their interstate journey, provided no discrimination is made against them on account of their character as objects of interstate commerce.

A municipal license tax upon insurance companies based upon premiums collected is not contrary to the commerce clause as insurance is not commerce. But a license tax upon railroad agencies and steamship agencies engaged in interstate commerce is a direct burden upon commerce.

An agent for a non-resident manufacturer taking orders for goods in a state cannot be subjected to a license tax merely on account of his occupation. But when such an agent rents a showroom and opens a local place of business, he may be taxed upon his local business. The opportunities for fraud and deception in the solicitation of orders for non-resident firms are held to be insufficient justification for placing a direct burden upon interstate commerce. Goods are moving in interstate commerce when shipped across a state line in pursuance of an order, whether the shipment is made to the customer or to the agent, whether the goods are wrapped for each customer or sent in bulk to the agent for delivery, and even whether the object shipped is incomplete before shipment such as an unframed picture, to be framed by the agent after a frame is selected by the customer. But such an operation as installing lightning rods which have been shipped in interstate commerce is a local transaction subject to local regulation.

When any goods are carried about by the agent or solicitor and

orders are taken and goods delivered on the spot, the transaction is purely local and the agent is engaged in peddling. Such peddling is always subject to local regulation. A license may be required although only a small portion of the business done is peddling. But the license in such a case is only upon such small portion and not upon any interstate business for which orders may be solicited. If orders are solicited for a company within the state, the agent may not be a peddler, but he is none the less subject to tax, as commerce immunity from state interference under the Federal Constitution attaches only to interstate and foreign transactions. The acceptance of a small cash deposit by the solicitor as compensation for his work does not make him a peddler.

A license tax upon manufacturers based upon their sales is not a tax upon interstate commerce merely because a part of the sales are made in such commerce. Manufacturing is not commerce although its products may become the subjects of commerce.

The specification of a product which can be secured only in a foreign country in the making of a public improvement is not such a restraint upon interstate commerce as will call for interference by the federal courts. Such a project may be in restraint of domestic trade, and may be effective in eliminating competitive bidding, but such matters are cognizable only under the local statute or common law of the states and present no federal question.

It is conceivable that the Supreme Court, in deciding *Gibbons v. Ogden,* and *Cooley v. Board of Wardens* might have claimed for the Federal Government the entire field of interstate and foreign commerce. But, as this was not done, a long line of decisions has carried on the process of drawing the line between state and national commerce functions. The process is still incomplete. The court has accommodated itself to circumstances upon frequent occasions, and it may well be said that the concession by it to the states in the field of pilotage laws, wharfage, and ferriage to some degree represents a willingness to be ruled by expediency in cases in which national control would be difficult, if not impossible.

As a whole, the limitations, express and implied, upon the exercise of municipal control over commerce do not bear harshly upon the cities. The Supreme Court has thwarted some attempts to burden interstate commerce for the benefit of local merchants, but it seems that the inflexible character of the rule prohibiting regulation of agents and solicitors for non-resident companies may cause an unnecessary hard-

ship in disallowing desirable and well-intended controls. Perhaps the solution for this is congressional legislation to authorize certain types of local regulation under the police power—as was done under the Wilson Act.

Another point at which the decisions of the Supreme Court seem to have established a harsh rule is in the denial of the right of the state to tax foreign imports which have come to rest in the state while they remain in the original packages. A rule like the one now applied to subjects of interstate commerce would seem logical and fair. The concept of the purchase by the importer of a right to sell, free from state control, is antiquated. Certainly, permission to tax these objects, not as imports, but upon the same basis as other property, would work no hardship upon the importer and would be fair to the state which is called upon to protect this property to the same extent as property which is considered to have become subject to its jurisdiction.

Chapter III

MUNICIPAL ORDINANCES UNDER THE CONTRACT CLAUSE

Article I, Section 10 of the Constitution of the United States provides in part that "No state shall . . . pass any . . . law impairing the obligation of contracts."[1] As municipal ordinances are laws of a state when properly enacted pursuant to statutory authority, we may consider this clause as a prohibition upon the enactment of any ordinance impairing the obligation of contracts as well as against any state law having such an effect.

It is improbable the framers of the Federal Constitution ever intended that the contract clause should be extended to cover the wide field which it occupies today.[2] The evil which it was designed to remedy, the passage by the states of laws for the issuance of paper money and for the release of bankrupts, thereby reducing or destroying the value of private contracts, had been effectively dealt with by the grant of power to the Congress to make uniform laws on the subject of bankruptcy and by the denial to the states of authority to emit bills of credit[3] and to make anything but gold or silver coin legal tender.

The precedent for the contract clause was probably found in the terms of a provision of the Northwest Ordinance, enacted by Congress in 1787 while the constitutional convention was still in session.[4] Here Congress, recognizing the evils of leaving the territory to its own devices in dealing with private contracts, provided that "no law ought ever to be made or have force within the said territory that shall in any

[1] In Owings *v.* Speed (1820) 5 Wheat. 420; 5 L. ed. 124, it was pointed out that this clause does not extend to any state law enacted before the first Wednesday in March, 1789, the date when the new constitution went into effect. See 12 C. J. 989.

[2] See Burdick, C. K., *The Law of the American Constitution*, pp. 451-2.

[3] Madison's Debates were prefaced by an introduction written by Madison in which the following statement occurs concerning the situation which existed just before the convention met, "In the internal administration of the states, a violation of contracts had become familiar; in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of other states, relatively creditors, as well as citizens creditors within the state."

[4] Passed Friday, July 13, 1787.

manner whatever interfere with or affect private contracts or engagements bona fide and without fraud previously formed."[5] Soon after the passage of this ordinance (August 28), Mr. Rufus King moved in the convention that there be added to the prohibitions upon the states then included in the draft a prohibition against interference with private contracts.[6] This motion, after considerable discussion, was dropped, as the prohibition against the passage of *ex post facto* laws by the states was deemed adequate to prevent the retrospective effect of laws affecting contracts which it was desired to avoid. Although John Dickinson reported the next day that he had found, upon consulting Blackstone, that the prohibition against *ex post facto* laws applied only to criminal legislation, no attempt was made at that time to alter the section on prohibitions as originally drawn.[7] The report of the committee on style, which was received by the convention on September 12, however, contained the contract clause. The prohibition was there directed to the passage of any laws "altering or impairing the obligation of contracts."[8] By an amendment adopted on September 14, the word "altering" was stricken out, leaving the clause in its present form.[9]

It would seem from this review of the history of the clause in the convention that its importance was not fully realized. Further, it appears that only private contracts were thought to be protected by it against impairment, and these only against such impairment as might result from a retrospective state law.

The Supreme Court had very little in the way of historical data and contemporary construction to aid it in the interpretation of the contract clause when cases began to come before it. (It should be remembered that the journal of the constitutional convention was not published until 1819, Madison's minutes of the debates did not appear until 1840, and the members of the convention had been pledged to secrecy.)

Two of the earliest cases decided by the court appear to run directly counter to the popular understanding of the meaning of the clause. As has been pointed out, it seemed to be generally agreed that it was not meant to apply to public contracts; that is, contracts to which a

[5] Art. 2 of "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio," *Journals of Congress*, Philadelphia, 1801, pp. 58-63.

[6] Madison, James, *Debates in the Federal Convention*. Hunt and Scott ed. N. Y. 1920, pp. 478 ff., pp. 478 ff.

[7] Madison, *op. cit.*, p. 483.

[8] Madison, *op. cit.*, p. 549.

[9] Madison, *op. cit.*, p. 567.

state was a party. But in *Fletcher v. Peck*, the first contract case, decided in 1810,[10] a grant of land by a state was held to be a contract within the meaning of the clause and hence to be protected by it against impairment. Soon afterward[11] the court decided the case of *Dartmouth College v. Woodward*[12] in which it was held that a charter granted by the state to a private corporation was also a contract and was protected against impairment by state law. These two decisions have been vigorously criticized, principally upon two grounds: first, that the grant and the charter involved in the cases were not contracts; and second, that assuming they might be contracts, still they were made by the state and were public and were not within the contemplation of the contract clause, which was applicable only to contracts between private parties.

The critics of these early decisions rest their objections to the doctrines established by them largely upon the alleged departures from the doctrines of the common law.[13] But it is too late now to disturb the precedents of a century. Truly enough, the Supreme Court has been occupied for a large part of that century in qualifying the broad assertions of the Dartmouth College Case. Thus the states have taken the hint to reserve the power to amend or repeal corporate charters. Power to contract away the power of eminent domain has been absolutely denied. The police power may be bartered away only in case of rate making and all contracts are subject to its reasonable exercise. The power of taxation may be contracted away only within reasonable limits. Property held by a state in trust cannot be alienated so as to defeat its public use. There is no contract right in a public office. These and many other limitations upon the doctrine of the Dartmouth College Case have been defined during the last century. Thus much of the harshness and the potential danger of the doctrine have been removed. Besides, most of the litigation over contract rights may also be brought under the due

[10] 6 Cranch 87. 3 L. ed. 162.

[11] In 1819.

[12] 4 Wheat 518. 4 L. ed. 629.

[13] Shirley, John M., *The Dartmouth College Causes.*
Hill, Clement H., 8 Amer. Law Rev. 198.
Orton, J. F., *Independent*, Aug. 19 and 26, 1909.
Cotton, J. P., Jr., *Marshall's Decisions.*
Smith, Jeremiah, *John Marshall* (ed. Dillon), vol. I, p. 154-155, 370.
Morawetz, *Corporations*, 2nd ed., sec. 1045, p. 1005.
Lodge, H. C., *Life of Webster.*

process clause, and it seems that the contract clause is being less relied upon, while the due process clause is undergoing rapid annotation.[14]

In order to understand this limitation upon state and municipal legislative action we must know: first, what a contract is; second, what the obligation of a contract is; and third, when the obligation of a contract is impaired.

1. What Is a Contract?

"A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other."[15] The Supreme Court has declared that the term "contracts," as used in this clause of the Constitution, is employed in its ordinary sense.[16] A contract, to be entitled to constitutional protection, may be either express or implied, executed or executory. The consideration may be no more than the general public benefit. Grants of land have been held to be contracts between the grantor and grantee, even though the grantor is the government.[17] The charter of a private corporation is a contract[18] as is also a franchise for the use of public property by a public utility.[19]

a. Is a Municipal Charter or Privilege a Contract with the State?[20]

There are some kinds of agreements or grants, however, which have been held not to constitute contracts within the meaning of the constitution. Such are charters or agreements between the state and its municipal subdivisions. The first case involving this point arose out of an act of the Maryland legislature granting certain stock subscriptions to the Baltimore and Ohio Railway Company. The act required the

[14] For general literature on contract clause see:

Hunting, Warren B., *The Obligation of Contracts Clause of the United States Constitution,* Baltimore, 1919, 120 pp. (Johns Hopkins University Studies in Historical and Political Science Series xxxvii, No. 4).

Norton, Thomas James, *The Constitution of the United States,* Boston, 1922, 298 pp.

Madison, James, *Debates in the Federal Convention of 1787,* Hunt, G., and Scott, J. B., ed. New York 1920, p. 731.

Journals of Congress, Phila. 1801 (1786-1787).

Elliott, Jonathan, *Debates on the Federal Constitution, Phila.,* 1866, 5 vol.

[15] Anson, Contracts, p. 9; 12 C. J. 1052 ff.

[16] Louisiana *v.* New Orleans (1883) 109 U. S. 285; 27 L. ed. 936.

[17] Fletcher *v.* Peck (1810) 6 Cranch 87, 3 L. ed. 162.

[18] Dartmouth College *v.* Woodward (1819) 4 Wheat. 518; 4 L. ed. 629. But the charter of a public corporation may be changed at will. See C. J. 1031(n).

[19] New Orleans Waterworks Co. *v.* Rivers (1885) 115 U. S. 674; 29 L. ed. 525; see also 12 C. J. 997.

[20] For further cases see 12 C. J. 1003 ff.; Dillon, J. F., *op. cit.,* vol. I, p. 179, sec. 106. Burdick, C. K., *op. cit.,* p. 459.

company to construct its lines through certain cities upon a penalty of $1,000,000 to be forfeited to the state for the benefit of the municipalities through which the road was to pass.[21]

The act was accepted by the railroad company, but a few years later the state legislature amended the original act to remove the requirement of building the line through certain municipalities and released the penalty. The road not having been built as required by the first act, a suit was brought by the state, for the use of the county, at its request, to collect the forfeiture. The county claimed that it had a contract interest in the penalty which was beyond the power of the legislature to release. The Supreme Court, however, speaking through Chief Justice Taney, denied this contention.

> The commissioners of Washington County are a corporate body, but like similar corporations in every other county of the state, it is created for purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which according to the laws and usages of the state are always entrusted to local county tribunals. Their powers and duties depend upon the will of the legislature, and are modified and changed and the manner of their appointment regulated at the pleasure of the state. The corporation had no private corporate interest in the fine.

This position was reaffirmed a few years later in a case involving ferry franchises granted to a Connecticut town and later repealed by the legislature.[22] The town claimed that the act of the legislature annulling the ferry grant was unconstitutional as impairing the obligation of a contract. The court held that the parties to the grant did not stand in a relation toward each other which would permit the making of a contract by the grant. Mr. Justice Woodbury, who delivered the opinion of the court, pointed out:

> The legislature was acting here on one part and public municipal and political corporations on another. They were acting, too, in relation to a public object. From the relation of the parties and the subject matter of their action we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts.

These two cases appear to rest upon the fact that since the legislature holds absolute power over the municipal corporations within the

[21] State of Maryland, for the use of Washington County *v.* Baltimore & Ohio Railroad Co. (1845) 3 How. 534; 11 L. ed. 714.

[22] Town of East Hartford *v.* The Hartford Bridge Co. (1850) 10 How. 511; 13 L. ed. 518. See also New Orleans etc. R. Co. *v.* Ellerman (1882) 105 U. S. 166; 26 L. ed. 1015; and Charles River Bridge *v.* Warren Bridge (1837) 11 Pet. 420; 9 L. ed. 773.

limits of a state, it could not make any contract with them which would not be subject to change by the legislature. Hence even if an agreement were made which had some of the attributes of a contract, it would lack mutuality and would not be protected by the Federal Constitution.[23]

A similar situation was presented in a case involving the interpretation of a statute of Louisiana in which the city of New Orleans claimed a contract right.[24] Here again the court held that a city could acquire no contract right from the state which could be availed of against the state itself.

Two recent cases from New Jersey illustrate further the relationship between the state government and the municipal corporations created by it. The state legislature had passed an act providing that every municipality or private person who should divert the water of streams or lakes for the purpose of a public water supply should make certain payments to the state treasurer. The city of Trenton claimed the right to take all the water it required without limitation as to quantity and without the payment of a license fee. The city asserted that this right had been acquired by the Trenton Water Works Company, a private corporation, and that all rights of this corporation had been purchased by the city. The city therefore claimed a contract right which would be impaired if the licensing act were applied to it. The state brought suit to recover the license fee and obtained a judgment. From this judgment the city appealed.[25]

The relations existing between the state and the water company were not the same as those between the state and the city. The company was organized and carried on its business for pecuniary profit. Its rights and property were privately owned and therefore safeguarded by the constitutional provisions sought to be invoked by the city against the state. The city was a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as might be entrusted to it. . . . The number, nature, and duration of the powers conferred and the territory over which it was to be exercised were held to rest in the absolute discretion of the state. Neither a municipal charter, nor any law conferring governmental powers, or authorizing a municipality to hold or manage such property,

[23] See 12 C. J. 1005.

[24] City of New Orleans *v.* New Orleans Waterworks Co. (1891) 142 U. S. 79; 35 L. ed. 943.

[25] City of Trenton *v.* State of New Jersey (1923) 262 U. S. 182; 67 L. ed. 937.

or exempting it from taxation, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the state constitution may do as it will, unrestrained by any provisions of the Constitution of the United States.

> Municipal institutions, "whether called cities, towns, or counties, are the auxiliaries of the state in the important business of municipal rule, but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature of the state, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact."[26] The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for governmental purposes, cannot be questioned. All the cases heretofore decided on this subject support the contention of the state here made, that the city cannot possess a contract with the state which may not be changed or regulated by state legislation.
>
> The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied to various branches of the law of municipal corporations. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defense based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of the constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities.[27] We hold that the city cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question.

The second case was decided at the same time. It involved the same New Jersey statute and presented similar facts.[28]

[26] Laramie Co. *v.* Albany Co. (1876) 92 U. S. 307; 23 L. ed. 552.

[27] For a contrary view see 12 C. J. 1004.

[28] City of Newark *v.* State of New Jersey (1923), 262 U. S. 192; 67 L. ed. 943.

b. *The Doctrine of Strict Construction of Municipal Franchise Grants*[29]

The next group of cases concerns the power of municipalities to make contracts of certain types. As noted in Chapter I, municipal powers are strictly construed. This is particularly true of power to grant franchises. Although power to make contracts in order to carry out the enumerated functions may be implied, a franchise is a grant of public rights to private individuals or corporations and will not be held valid if exercised beyond the power expressly granted.

This principle, as applied to municipal corporations, is first mentioned by the United States Supreme Court in an action by the owner of a ferry operating between Oakland and San Francisco, California, to restrain the operation of a second ferry between the same points.[30] He claimed an exclusive franchise from the city of Oakland. The defendant admitted that if the city had power to make an exclusive grant, such a grant had been made to the plaintiff, but denied that such power had been conferred upon the city.

The court found upon an examination of the city charter that the city had been given power "to lay out, make, open, widen, regulate and keep in repair all streets, roads, bridges, ferries, wharves, docks, piers, and slips and to authorize the construction of the same." Such power was held not to empower the city to grant an exclusive franchise. Hence the contract was held not to be exclusive and not to have been violated by the granting of rights to a second ferry company.

Another such case arose out of a claim by a street railway company that it had been granted an exclusive franchise for a term of twenty-five years which was impaired by a state law incorporating a new company.[31] The grant from the city purported to be exclusive but was attacked as *ultra vires* in this particular. The court said:

> While authority is conferred in the code upon municipalities to grant privileges for the use and enjoyment of the streets it would be a very forced construction to hold that the power to grant such a franchise for twenty-five years is included in such a provision. Contracts undoubtedly may be made by such municipalities, to the extent of the authority conferred for that purpose by the legislature, but the granting of a

[29] For further cases see note 45, 12 C. J. 1032; Dillon, J. F., *op. cit.*, vol. III, p. 1970, sec. 1233; McQuillin, E., *op. cit.*, vol. IV, p. 3469, sec. 1652.

[30] Minturn *v.* La Rue (1860), 23 How. 435; 16 L. ed. 574. See also Fanning *v.* Gregoire (1853), 16 How. 524; 14 L. ed. 1043.

[31] Peoples Co. *v.* Memphis Co. and City of Memphis (1869) 10 Wall. 38; 19 L. ed. 844.

> franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts.

A similar case was presented by the contention of a street railway company in Detroit, Michigan, that it possessed an exclusive franchise from the city which was impaired by a subsequent franchise for the same purpose granted to third parties.[32] Here, too, the company relied upon a grant which purported to be exclusive. The city and the second railway company asserted the lack of power of the city to grant an exclusive right of this nature. The court, speaking through Mr. Justice McKenna, said:

> The common council of Detroit possessed no inherent power to confer the exclusive power claimed by the plaintiff in error. It is further clear that the statutes do not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. Such a power must be given in language explicit and express, or necessarily to be implied from other powers. Necessarily implied means inevitably implied—a probability of intention so strong that a contrary intention cannot be supposed.
>
> Easements in the public streets for a limited time are different and have different consequences from those granted in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently, those given in perpetuity and those in monopoly must have for their authority explicit permission, or if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.

The city of Hutchinson, Kansas, acting under a general welfare clause and a specific power to furnish electric light, enacted an ordinance granting a twenty-year exclusive franchise for the furnishing of water, light, heat, and power by means of electricity and gas. Eight years later it passed another ordinance granting to a second company the privilege of constructing street railways and gas plants. The first company objected, claiming an exclusive right to furnish gas under its franchise.[33] The court held that the city possessed no power to grant such an exclusive right.

Another claim of an exclusive grant is made in *Piedmont Power and Light Company v. Town of Graham*.[35] This was a bill for an

[32] Detroit Citizens Street Railway Co. *v.* Detroit Railway and City of Detroit (1898) 171 U. S. 48; 43 L. ed. 67.

[33] Water Light & Gas Co. *v.* City of Hutchinson (1907) 207 U. S. 385; 52 L. ed. 257.

[35] (1920) 253 U. S. 193; 64 L. ed. 855.

injunction to restrain the granting of a franchise by the town to a second electric light and power company. The granting of such a franchise, it was claimed, would impair the obligation of complainant's contract with the town. Mr. Justice Clarke, who delivered the opinion of the court, said in part:

> The grant to the appellant is set out in full in the bill and plainly it is not one of exclusive rights in the streets. . . The grant to the appellant not being an exclusive one, the contention that competition is business, likely to result from a similar grant to another company would be a violation of the appellant's contract . . . is so frivolous that the motion to dismiss for want of jurisdiction must be sustained.

The effect of granting a franchise for the life of a corporation is automatically to extend it without municipal action or consent if the life of the corporation itself is legally extended. This is shown in *City of Owensboro v. Owensboro Waterworks Co.*[36] Relying on the assumption that a grant for corporate life terminated at the end of the original period, the city attempted to oust the company from the streets. The company sought an injunction against this action. The company had extended its corporate life in the manner provided by statute and relied upon the original franchises as being adequate authority for a continuance of its street rights. The court said:

> None of the claims of the city have any support in the ordinance. Its terms are direct and its meaning plain. It not only grants a franchise but makes the life of that franchise coextensive with the plaintiff's existence. Of the suggestion that, under this view, the franchise may be made perpetual by repeated extensions of the plaintiff's corporate life, it is enough to say that we are here concerned with but a single extension already effected.

Justices Clarke, Brandeis, and Day dissent.

When a charter grant by a state confers upon a utility company complete authority to do business in the state, subject only to the consent of a municipality, that consent, once given, may never be withdrawn unless withdrawal is expressly authorized by the statute or reserved in the ordinance. Such a situation was presented in *City of Louisville v. Cumberland T. & T. Co.*[37] After giving its consent in 1886, the city sought to withdraw it by a repeal of the ordinance in 1908.

[36] (1917) 243 U. S. 166; 61 L. ed. 650.

[37] (1912) 224 U. S. 649; 56 L. ed. 934. See also 225 U. S. 430; 56 L. ed. 1151 and 231 U. S. 652; 58 L. ed. 419.

The company obtained an injunction against the repeal. The court said:

> When the assent was given, the condition precedent had been performed, the franchise was perfected, and could not thereafter be abrogated by municipal action. For, while the city was given the power to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the ordinance. . . If the terms of the ordinance had been broken by the company (as the city alleged), the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred.

In *King Mfg. Co. v. City of Augusta.*[37a] The company sought to enjoin the enforcement of a city ordinance fixing rates for water power supplied from a canal owned by the city on the ground that it impaired the obligation of an alleged contract to furnish such water power to the company in perpetuity at a lower rate. The Supreme Court, after examining the evidence concurred in the findings of the lower courts that no such perpetual obligation as to rates existed.

In a rather unusual decision, the Supreme Court in 1918 held that a municipal charter power to regulate and control the streets could be used as a basis for an implied power to grant a perpetual franchise.[38] The question arose over an attempt by the city to secure by advertisement bids for a franchise to occupy the same streets as were used by the company for street railway purposes. The contract on which the plaintiff relied was made in 1869. The court said:

> As there is no hint at any limitation of time in the grant, and, on the other hand, the city grants all the right and authority that it has the capacity to grant, there can be no question that the words purport a grant in perpetuity.

The doctrine announced by this case is certainly a departure from that usually held by the Supreme Court, and it is difficult to account for it in view of the general rule of strict construction of municipal powers. True, Mr. Justice Holmes, who delivered the opinion, pointed out that there was no decision of the Kentucky courts which controverted the construction that such a power as that suggested above permits a city to confer a perpetual franchise. But one would think that the Supreme Court would hardly have been justified in abandoning its long established doctrine of strict construction both of municipal charters and

[37a] King Mfg. Co. *v.* City of Augusta (1928) 277 U. S. 100; 48 Sup. Ct. Rep. 489 72 L. ed. 801.

[38] City of Covington *v.* S. Covington & C. St. Ry. (1918) 246 U. S. 413; 62 L. ed. 802.

franchise grants. It is interesting to note that Justices Clarke and Brandeis dissent.

c. *When is a Grant a Revocable License Instead of a Contract?*[39]

Not every right of the use of a street which may be granted by a municipal council constitutes a contract. The next group of cases deals with situation in which such occupancies have been held to be mere licenses, revocable at the option of the municipality.

The first of these concerned the occupancy of the streets of the city of St. Louis by a telegraph company.[40] The city had levied a license tax upon the company in the nature of a rental for the use of the streets, based on the number of poles owned by the company. The Supreme Court held the company liable to pay the tax, and on petition for rehearing the company urged its contract right to occupy the streets, based upon its acceptance of the post road act of 1866. The court said, "Whatever permission has been given is only a license which might be revoked at any time." The city was held to have under its home rule charter a wide power of regulation of the use of the streets. "If the city gives a right to the use of its streets or public grounds it simply prescribes the terms and conditions upon which they shall be used."

A railroad company secured from the city council of Defiance, Ohio, permission to construct bridges over the tracks for the use of a highway. Later the council passed an ordinance requiring a grade crossing to be constructed. The railroad company objected on the ground that to comply with the order would be to create a dangerous crossing, and urged that the original permission to erect the bridges constituted a contract which could not be impaired.[41] The court said:

> The language of the ordinance is rather that of a license than a contract. . . It is incredible in view of the language of this ordinance that the city should have intended, or the railroad company expected, that the former thereby relinquished forever the right to improve or change the grade of the streets. If it were possible that the city could make such a contract at all, it could only be done by express authority of the legislature, and in language which would admit of no other interpretation. Properly construed, the ordinance was simply a license.
>
> The right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants.

[39] See also 12 C. J. 1012; McQuillin, E., vol. IV, p. 3366, sec. 1616.

[40] City of St. Louis *v.* Western Union Telegraph Co. (1893) 149 U. S. 465; 37 L. ed. 810.

[41] Wabash Railroad Co. *v.* City of Defiance (1897) 167 U. S. 88; 42 L. ed. 87.

The next case in this group involves a claim by certain wharf owners in Portland, Oregon, that an ordinance of that city closing access to the wharves from a street impaired the obligation of a contract between them and the city arising out of a previous agreement as to the leaving open of a passageway in a bridge which afforded access to their property.[42] The court considered the bridge as a portion of the public street and said:

> The fundamental proposition in the case is the power of the city over its streets, and how far that power was limited or could be limited by the ordinance on which the plaintiffs rely . . . interpreting the ordinance . . . the Supreme Court of Oregon decided that neither the plaintiffs nor their predecessors in interest were granted rights or privileges in the street different in kind from those enjoyed by the public. . . . We are inclined to an agreement with the state court.

Hence the ordinance was held to confer, if anything, a mere license, revocable at the will of the municipality.

An ordinance of the city of Raleigh, North Carolina, directing the removal of a spur track from a sidewalk at a designated place was contested by the railroad company on the ground that the ordinance violated the obligation of a contract.[43] As in the Defiance case, the court held that a mere permission to use public property gave rise to no contractual rights and was a mere revocable license. Chief Justice White, who delivered the opinion of the court, said:

> On the very face of the consent which was given, a mere right to occupy was conveyed, without any contract as to time, and which therefore, taking the best view for the railroad, amounted to conferring upon it a mere license . . . subject to the power of the city to revoke it whenever it deemed the municipal interest required it to do so.

The company maintained that even if this were the case, inasmuch as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and consent of the city, thereby the existence of a contractual and permanent right must be inferred. The court answered this contention by a *reductio ad absurdum* saying, "Indeed this amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent." This contention was held obviously unsound.

The municipality of Boise City, Idaho, sought to levy a monthly license fee upon a local water company for the privilege of occupying the

[42] Mead *v.* City of Portland (1906) 200 U. S. 148; 50 L. ed. 413.

[43] Seaboard Air Line Ry. *v.* City of Raleigh (1916) 242 U. S. 15; 61 L. ed. 121.

streets. The company pleaded a franchise granting the right of occupancy. The city answered that this franchise was a mere revocable license.[44] The court said in its opinion:

> The right acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. The grant was made in contemplation of the investment of large capital in the construction of a system. The presumption is that no such enterprise would have been entered upon if the street easement were subject to immediate revocation . . . We hold that the street easement was not a mere revocable license.[45]

The State of Ohio sought by action in *quo warranto* to oust an electric company from the use of the streets of a village. The company claimed a franchise right to continue its use of the streets. The Supreme Court of the state held that the franchise had been terminated by appropriate village action at the expiration of a ten-year period, under proper authority.[46] But the Supreme Court of the United States, upon review of the case, held that the franchise was perpetual, and not subject to termination at the will of the grantor.

d. *May a Municipality Contract Away the Police Power?*[47]

As was suggested in the Defiance case, a municipality may not contract away its legislative or police power, as it has been given this in trust for the benefit of all of the people of the locality. The next group of cases deals with this question.

The legislature of the State of Louisiana in 1869 passed an act granting to the Crescent City Live Stock Landing and Slaughter House Company a monopoly for twenty-five years of the stock yards and slaughtering business at New Orleans. This law was attacked by the other slaughter houses and butchers of the city under the Fourteenth Amendment. The Supreme Court held, however, that the federal courts could not interfere as the question was entirely one of state concern.[48] In 1879 the state adopted a new constitution prohibiting monopolies and the city of New Orleans enacted ordinances which opened to general competition the right to build slaughterhouses, establish stock landings, and engage in the business of butchering in the city in dis-

[44] Boise A. H. & C. W. Co. *v.* Boise City (1913) 230 U. S. 84; 57 L. ed. 1400.

[45] For additional cases see 12 C. J. 1015, note 90.

[46] Ohio Public Service Com. *v.* State of Ohio ex rel Fritz (1927) 274 U. S. 12; 47 Sup. Ct. Rep. 480. 71 L. ed. 898.

[47] See 12 C. J. 991 ff.; also 12 C. J. 1038 ff.

[48] Slaughter House Cases (1873) 16 Wall. 36; 21 L. ed. 394.

regard of the monopoly granted to the Crescent City Company. The company, on the allegation that the provisions of the new constitution and subsequent ordinances were a violation of its contract with the state, brought suit in the federal courts. The Circuit Court sustained the view that the act of 1869 and its acceptance by the company constituted a contract for the exclusive right mentioned in it for twenty-five years.[49] The Supreme Court, however, reached a different conclusion. Mr. Justice Miller, who delivered the opinion of the court, said:

> No one can examine the provisions of the act of 1869, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration. It admits of little doubt that the city has impaired the obligation of the supposed contract imposed by those provisions upon the state.

He pointed out, however, that such a contract was beyond the power of the state to make.

> The power of the legislature intended to be sustained is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well known but undefined power called the police power. . . . The preservation of the public health and morals is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of its power to preserve health and repress crime.

The constitution and ordinances were consequently held not subject to the objection that they impaired the obligation of a contract.

In a similar case a chemical and fertilizer works in the village of Hyde Park, near the city of Chicago, claimed a contract right to haul garbage and offal through the village and carry on its business therein.[50] When the plant was constructed the country around was swampy and nearly uninhabited, giving very little promise of further development. But with the growth of the city the plant became an unendurable nuisance to the inhabitants for many miles around its location.

The company was incorporated in 1867. Three days before the charter of the company took effect, the legislature amended the charter of the village to prevent it from prohibiting the erection of the plant within its limits. Nothing of this kind, however, was placed in the company's charter. In 1869, the charter of the village was revised and the trustees were expressly authorized to define and abate nuisances which

[49] Butchers' Union Co. *v.* Crescent City Co. (1884) 111 U. S. 746; 28 L. ed. 585.

[50] Northwestern Fertilizing Co. *v.* Village of Hyde Park (1878) 97 U. S. 659; 24 L. ed. 1036.

were or might be injurious to the public health, but with the proviso that the powers should not be exercised against the plaintiff company until after two years from the passage of the act. The municipality thereupon passed an ordinance declaring that no person should transport any offal or other offensive matter through the village, nor carry on any offensive business within the limits of such village, nor within one mile of those limits. During and after the adoption of this ordinance, and the expiration of two years, the company continued to transport offal through the village as before. Employees were arrested and convicted and the company brought action to restrain the enforcement of the ordinance. It claimed that it was protected by its charter against the ordinance and that the charter was a contract within the meaning of the Federal Constitution.

Mr. Justice Swayne delivered the opinion. He pointed out that the rule of construction in this class of cases was that it should be most strongly against the private corporation. The silence of the company's charter as to immunity from village action was an important fact. The company could not base a contract right upon the provisions of the village charter, which might be changed by the legislature at any time. The court said:

> The charter was a sufficient license until revoked, but cannot be regarded as a contract, guarantying in the locality originally selected, exemption for fifty years from the exercise of the police power of the state, however serious the nuisance might become in the future by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

Not every agreement dealing with police power subjects, however, is an attempt to barter away this governmental authority. In *Missouri K. & T. Ry. v. State of Oklahoma*[51] the city of McAlester had made a contract with the railroad company by which the city agreed to pay the cost of opening certain streets across the railroad right of way. Subsequently the state legislature created a corporation commission which was given authority to order the separation of grades and to apportion the cost. The city applied to the commission for an order respecting one of the crossings mentioned in the contract. The order was issued and the cost was ordered to be paid by the company and city. The company objected to the order on the ground that it impaired the obligation of its contract.

[51] (1926) 70 L. ed. 957. 271 U. S. 303. 46 Sup. Ct. Rep 517.

The city contended that its ordinance was void because it was an attempt to surrender the police power. The court agreed that if the contract tended to hamper the state's police power reasonably to regulate the construction and use of the crossing, the ordinance was undoubtedly void. "But," said the court, "there is nothing in the ordinance that involves any attempt to interfere with or hinder the proper exertion of the police power." The order of the commission as to the apportionment of the cost consequently was held to impair the obligation of the contract.

The New Orleans Waterworks Company took action to enjoin the laying of pipes in the streets to supply a hotel with water from the Mississippi River.[52] The company's franchise was granted in 1877 and conferred exclusive privileges. The Constitution of Louisiana of 1879 repealed all monopoly features of any corporation except railroad companies. Under that provision the city passed an ordinance granting to one Rivers the right to lay pipes in the streets from the river to the hotel. The court said:

> The plaintiff's grant, . . . not being at the time prohibited by the constitution of the state was a contract, the obligation of which cannot be impaired by subsequent legislation or by a change in her organic law. It is idle to insist that this contract was prejudicial either to the public health or to the public safety. . . The power remains with the state, or with the municipal government of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the use of the streets, as well as to prevent the distribution of water unfit for use, and provide for a continuous supply as protection to property may require.[53]

A special type of police power frequently conferred upon municipalities is that of regulating the rates to be charged for services by local utilities. A case involving this power arose out of an ordinance of the board of supervisors of Stanislaus County, California, fixing rates for water for irrigation purposes.[54] The water company claimed that it had a contract with the state under an act of 1862, by reason of which the state could not thereafter authorize the board of supervisors to fix rates so low as entirely to disregard the capital actually invested. The lower court found that the rate fixed by the board of supervisors reduced the income of the company below 6 per cent upon the capital actually invested.

[52] New Orleans Waterworks Co. *v.* Rivers (1885) 115 U. S. 674; 29 L. ed. 525.

[53] See also note 71, 12 C. J. 992.

[54] County of Stanislaus *v.* San Joaquin, etc., Canal & Irrigation Co. (1904) 192 U. S. 201; 48 L. ed. 406.

The Supreme Court, however, held that in its opinion the act was not intended to form a contract. Mr. Justice Peckham said in the opinion, "It seems to us that the language of the statutes cannot properly be construed to promise or pledge that the limitation as to rates may not be altered at any time, when in the judgment of the legislature it may be proper to do so."

A claim that a contract between a telephone company and the city of Los Angeles constituted a contract as to rates was made by the company after the city council had sought by ordinance to fix a new schedule of rates.[55] The court accepted the view of the lower tribunal on the question of the city's power to legislate as to the rates, saying through Mr. Justice Moody:

> The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation. The facts in this case showed that the city had the power to regulate, but had no authority to enter into a contract to abandon the governmental power itself.

This opinion implies that if proper power had been granted such a contract could have been made.

A third case involving the same point arose out of an ordinance of Kansas City, Kansas, which a gas company claimed constituted a contract authorizing it to charge rates for gas in excess of those specified in a later statute which the company claimed impaired the obligation of its contract.[56] After a consideration of the statute under which the city was operating at the time the alleged contract was made, the court decided that the city had no power to divest itself by contract of its duty to see that nothing but reasonable rates were charged.

In a proceeding by the city of Englewood, Colorado, to compel an interurban railway company to make certain transfer arrangements without additional charge, the company replied that its rates had been approved by the state public utilities commission and could not be altered. The city merely wished to have the company comply with the terms of its franchise which required it to make the arrangements requested and claimed that the practical annulment of the franchise by the action of

[55] Home Telephone and Telegraph Co. *v.* City of Los Angeles (1908) 211 U. S. 265; 53 L. ed. 176.

[56] Wyandotte Co. Gas Co. *v.* State of Kansas (1914) 231 U. S. 622; 58 L. ed. 404.

the public service commission was an impairment of the obligation of the franchise contract.[57]

In its decision the court was satisfied merely to affirm the action of the state Supreme Court which upheld the action of the commission. No question was raised concerning the right of the city to suggest the impairment of the contract. It would seem that, in view of the position of the city as a subordinate unit of the state, no serious question could be raised as to the power of the state to transfer from one agency of the state to another the duty of regulating rates and services of utilities. The case was decided, however, on the ground that the city had not been empowered to contract away the rate regulatory power of the state.

In a recent case from San Antonio, Texas, the city sought to compel a street railway company to continue to offer service at a rate fixed by franchise regardless of the fact that the rate had been adjudged confiscatory.[58] Chief Justice White, in the opinion of the court, said:

> We are of the opinion that the ordinance fixing the five-cent fare was not a contract, in view of the provisions of the state constitution. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of the government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership are independent and reciprocal. . . . All the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property.

In *Peoples G. L. & C. Co. v. City of Chicago*,[59] the company sought to restrain the enforcement of a city ordinance regulating the price of gas on the ground that it impaired the obligation of a contract. The act incorporating the company authorized the city to fix the price to be charged for gas ten years after the passage of the act, but not to compel the company to furnish gas at a rate of less than $3.00 per thousand feet. Later, under an act authorizing the same, this company became consolidated with ten other companies. One of these was incorporated under a charter with no restriction upon the power of the city to regulate the price of gas. In 1900 the city council passed an ordi-

[57] City of Englewood *v.* Denver & S. P. Ry. Co. (1919) 248 U. S. 294; 63 L. ed. 253.

[58] City of San Antonio *v.* San Antonio Public Service Co. (1921) 255 U. S. 547; 65 L. ed. 777.

[59] (1904) 194 U. S. 1; 48 L. ed. 851.

nance restricting the charges for the consolidated company to 75 cents per thousand. The court said:

> The general rule is that a special statutory exemption such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So the act of 1897 (consolidating the companies) cannot be construed as extending any prior immunity the acquiring company possessed over the whole system of all the companies consolidated.

e. *May a Municipality Contract Away the Power of Taxation?*[60]

The next group of cases which will be considered deals with a question quite closely connected with the one just reviewed — the power to contract away the power of taxation, another one of the essential powers of government.

A salt manufacturing company claimed exemption from taxation for city purposes in East Saginaw, Michigan, by virtue of an act of the legislature for encouraging the manufacture of salt. The city, relying on a subsequent law repealing the exemptions granted by the earlier one, assessed the property of the company for purposes of local taxation.[61] The company claimed that the first act constituted a contract which had been impaired by the subsequent repeal and taxation. Mr. Justice Bradley, in delivering the opinion of the court, pointed out:

> Had the plaintiff been incorporated under a special charter containing an exemption, and the charter had been accepted by the company, this would have constituted a contract. But the case before us is not of that type. This law was a bounty law. Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture . . . are always under the legislative control and may be discontinued at any time.

An insurance company doing business in the city of Augusta, Georgia, refused to pay a license tax of $250 per year imposed upon all

[60] For a general discussion and further cases see 12 C. J. 993 ff., also 12 C. J. 1042 ff.; Dillon, J. F., *op. cit.*, vol. IV, p. 2443, sec. 1401; Burdick, C. R., *op. cit.*, p. 460.

[61] East Saginaw Salt Mfg. Co. *v.* City of East Saginaw (1872) 13 Wall. 373; 20 L. ed. 611.

such companies by the city, on the ground that under the general law by which it was authorized to do business in the state, it had acquired a contract exemption against this type of taxation.[62]

The act authorizing the company to do business in the state was carefully examined and the court held that it did not circumscribe in any degree the taxing power of the state or of any municipality clothed with proper authority. The court said:

> If it were competent for the state to impose a tax of one per cent upon the gross amount of premiums, it would have been equally so for the state to impose a further tax. The same is true of the city council. There is no sensible ground of contract prohibition upon which the claim of exemption from either can be placed.

The company further urged that as the city tax in question was a license tax, it might be prevented from doing business in the city if the tax were not paid, and such a result would defeat its authority to do business in the state and thus impair the obligation of the contract on this subject between the company and the state. To this the court answered:

> In the ordinance in question the tax is designated as a license tax, but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its non-payment, and no second license is required to be taken out. But even had the ordinance been otherwise in these particulars, viewing the subject in the light of the license tax cases, the results would have been the same.

A similar set of facts is presented by a case which arose out of an attempt of the Taxing District of Shelby County, Tennessee, to levy a license tax upon the Memphis Gas Light Company.[63] The company refused to pay the tax, claiming exemption under its charter, and the taxing district caused the arrest of the secretary of the company. He was fined, and appealed to the state supreme court. From judgment of that court the company sued out a writ of error.

The Supreme Court after inspecting the charter in an attempt to find any contract of exemption decided that none existed. Counsel for the company argued that if no express contract could be found, it must be implied because to permit the municipality to levy a license tax as a condition precedent to the exercise of its corporate franchises would tend to destroy the privilege. The court declined to follow this line of reasoning, saying:

[62] Home Insurance Co. *v.* City of Augusta (1876) 93 U. S. 116; 23 L. ed. 825.

[63] Memphis Gas Light Co. v. Taxing District of Shelby Co. (1883) 109 U. S. 398; 27 L. ed. 976.

> The company took its charter subject to the same right of taxation in the state that applies to all other privileges and all other property. If it wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of its business, it should have required a provision to that effect in its charter. The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states. That is left to the state constitutions and state laws. There is in this case no language which exempts the plaintiff from taxation, nor is there even the most remote implication of such exemption.

One of the grounds urged by the Wiggins Ferry Company against a license tax imposed upon its boats by the city of East St. Louis was that such a tax would impair the obligation of its charter.[64] But the court was of the opinion that the charter of the company could not be so construed as to exempt it from taxation which the state might see fit to impose or to authorize the city to impose.

A similar situation was presented by an objection to a license tax levied by the city of New Orleans upon a street railway which claimed an exemption from the tax under its charter.[65] The company in purchasing its lines from the city agreed to construct new lines, keep all in repair, and pay into the treasury the annual tax levied upon real estate. The company claimed that this mode of taxation was exclusive, and that no further tax could be levied upon its property. Mr. Justice Gray, speaking for the court, said:

> Exemption from taxation is never to be presumed. The contract in question affords no evidence of any intent to exempt the company from taxation. The company took its charter subject to the same right of taxation in the state that applies to all other privileges and all other property. There is no implied exemption from taxes in addition to those levied upon the basis of value of property.

This point was presented again in a case which arose in Savannah, Georgia. Here a street railway claimed exemption from a license tax on the ground that by a contract with the city it was implied that the company was to have the use of the streets without further charges than those which it imposed.[66] The court dismissed this contention with the remark that if the city had attempted to bargain away its right to tax, probably it would have been acting beyond its power. However, it was

[64] Wiggins Ferry Co. *v.* City of East St. Louis (1883) 107 U. S. 365; 27 L. ed. 419.

[65] New Orleans, etc. R. R. Co. *v.* City of New Orleans (1892) 143 U. S. 192; 36 L. ed. 121.

[66] Savannah etc. Railway *v.* City of Savannah (1905) 198 U. S. 392; 49 L. ed. 1097.

pointed out that it made no such attempt. The contract used no language to that effect, or words which even indirectly implied that exemption for the future was contemplated.

A somewhat unusual situation was presented in a case which also arose from the city of Savannah. Prior to 1790, the city owned certain lots called common lots and in that year disposed of part of them. Each lot was valued by the city and put up for sale at auction to the highest bidder. If the purchaser chose to pay the whole amount of his bid in cash, he received a deed conveying it to him in fee, or he might agree with the city to pay in cash the excess of his bid over the valuation and also to pay a ground rent of 5 per cent on the amount of the valuation. In the latter event the lessee might retain the lot and devise it to his heirs. If thereafter the purchaser or his heirs paid the original valuation money he received a title in fee. Every annual tax ordinance passed by the council between 1806 and 1857 exempted by a special clause the lots held under ground rent. In the latter year a general ordinance was passed exempting lots so held from city taxation. Thereafter, no city tax was ever levied until 1889-90 when the city provided for the valuation and taxation of these lands for the first time. The holders of the lots had always paid state and county taxes, street improvement and sidewalk taxes, and all other assessments and burdens common to property owners except city taxes. The occupiers of these quit-rent lots claimed exemption from city taxes and attacked the ordinance as impairing the obligation of a contract.[67] The Supreme Court, speaking through Mr. Justice Peckham, said in part:

> Taking all of the foregoing evidence into consideration, we are unable to see that any contract of exemption has been proved. The payment of taxes upon property otherwise liable to taxation can be avoided only by clear proof of a valid contract of exemption, and the validity of such contract presupposes a consideration therefor.

The state constitution of 1877 was held to require taxation of all property save that expressly exempted by the legislature. That the mandate had been theretofore disregarded was said to be no reason why it should not be obeyed then.

The question of tax exemption by contract is neatly summarized by Mr. Justice Day in the opinion in the case of *City of St. Louis v. United Railways Co.*[68] Here the street railway company was seeking to enjoin enforcement of a municipal ordinance which purported to levy a tax of

[67] Wells *v.* City of Savannah (1901) 181 U. S. 531; 45 L. ed. 986.
[68] (1908) 210 U. S. 266; 52 L. ed. 1054.

one mill for each pay passenger on each car in lieu of a former tax of $25.00 per car per year. The company claimed a contract right to the use of the streets upon payment of the amounts mentioned in its franchise. The city was expressly authorized by its charter to levy the tax in question, although it was not one of those mentioned in the franchise. The court, speaking through Mr. Justice Day, said:

> The principles involved in this case have been the subject of frequent consideration in this court; and, while it can be no longer doubted that a state or municipal corporation may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can follow only when the state or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption.

The court was of the opinion that, judged by these principles, the ordinances relied upon as contracts did not contain any clearly expressed obligation on the part of the city surrendering its right to impose further license fees.

In *Henderson Bridge Co. v. Henderson*[69] the company sought to obtain exemption from taxation. One of the grounds relied upon by the company to defeat the city's claim of right to tax its property was that at the time the bridge was constructed it was the law of Kentucky as expressed in the decisions of its Supreme Court that structures of that kind were exempt from local taxation. It claimed that these decisions partook of the nature of a contract between the company and the state that no such taxes would ever be levied. The state courts distinguished the case from *Louisville Bridge Co. v. Louisville*[70] and held that the Henderson bridge was liable to be taxed. The Supreme Court followed this view and held that the company could acquire no contract right in a judicial interpretation of the state laws in the sense that it would be entitled to the protection of the Federal Constitution against a change in the views of the courts.[71]

f. *May the Public Acquire Contract Rights in General Ordinance Rule?*

In *Garrison v. The Mayor, etc. of New York*,[72] Garrison claimed

[69] (1899) 173 U. S. 592; 43 L. ed. 823.

[70] (1883) 81 Ky. 189.

[71] As to power to contract away right to exercise eminent domain see: Pennsylvania Hospital *v.* City of Philadelphia (1917) 245 U. S. 20; 62 L. ed. 124.

[72] (1875) 21 Wall. 196; 22 L. ed. 612.

that a statute passed in 1813 concerning the manner of exercise of the power of eminent domain by the city could not be altered by a subsequent statute in such a way as to affect his rights under the earlier law in a condemnation proceeding completed under it. It happened that two months after the completion of the proceedings under the earlier law, a statute was passed to permit an appeal by the city from the award if made within four months after the entry of the order. Such an appeal was taken and the Supreme Court found that it appeared that there had been error, mistake, irregularity, and illegal acts in the proceedings. Garrison then brought action to recover the amount of the original award from the city on the ground that the order of the appraisers was final and conclusive. In answer, the city set up the act authorizing the appeal. Garrison maintained that to give effect to the act in his case would impair the obligation of a contract. The Supreme Court said:

> There is no case presented in which it can be justly contended that a contract has been impaired. It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. In the proceeding to condemn the property of the plaintiff for a public street there was nothing in the nature of a contract between him and the city.

The question as to whether or not a property owner who has made valuable improvements upon his property, relying upon an established grade in a street, may claim a contract right in the grade so established has been decided in the negative.[73] Chief Justice Marshall, in deciding this point, stated that a power to provide by ordinance for the grading of streets was a continuing one. The ordinance establishing such grades was held not to be a compact, and the corporation was held to have ample authority to alter it without violating the contract clause.

The readjustment due to the alteration of the system of public land tenures in the city of San Francisco gave rise to a claim of one of the settlers on the pueblo land that the city ordinance which outlined a method of procedure in making the adjustment had given rise to a contract right which was impaired by the city's subsequent conduct.[74]

The plaintiffs based their claims to the land or compensation therefor upon a supposed contract contained in a city ordinance of 1855. The state supreme court decided against this claim and an appeal was taken to the United States Supreme Court. Chief Justice Waite, who delivered the opinion of the court, said, "We find in the case no trace

[73] Goszler *v.* Corporation of Georgetown (1821) 6 Wheat. 593; 5 L. ed. 339.

[74] Clark *v.* San Francisco (1888) 124 U. S. 639; 31 L. ed. 553.

of a contract between the plaintiff and any one, which ever vested in the plaintiff any rights different from those awarded to him."

The final case for consideration in this group deals with an alleged prescriptive contract right acquired by a railway company in the use of the submerged lands along the shore of Lake Michigan in Chicago.[75] The railroad company proposed to reclaim by filling in certain lands submerged by the shallow waters of Lake Michigan in front of property owned by the railroad company in fee. The purpose was to erect upon such reclaimed land an engine house which the company claimed was necessary to the operation of the road. The company had secured permission from the Secretary of War and the Commissioner of Public Works of the city to repair the breakwater which protected its roadbed, but while engaged in filling in land beyond that needed to protect the breakwater it was prevented by the police force of the city from completing the work.

The city, in answer to the application by the company for an injunction to prevent such interference, set up an adequate charter power to regulate the harbor. It claimed under its general police powers authority to prevent the company from filling up the lake and intruding upon its navigable waters. The company claimed under its charter the right to appropriate for itself any of the lands covered by the waters of the lake, providing navigation was not interfered with and that this right had become vested so far as to give rise to a prescriptive contract.

The Supreme Court denied the existence of such a contract right. The charter was held to give no uncontrolled power to the railroad company to take such submerged lands as were thought necessary by it. Mr. Justice Brown, who delivered the opinion of the court, said:

> The subjection of the railroad company to the will of the council, therefore, deprived the company of nothing it before possessed, but limited the exercise of a right which had not yet become vested and which was still subject to the police power.

g. *Effect of Expiration of Time Limits Upon Franchise Contracts*[76]

The next group of cases deals with the effect of the expiration of time limitations upon contracts. Franchises, which we have seen are contracts if properly made and accepted, usually are granted for a term of

[75] Illinois Central Railroad Co. *v.* City of Chicago (1900) 176 U. S. 646; 44 L. ed. 622.

[76] See McQuillin, E., *op. cit.*, vol. IV, p. 3489, sec. 1658; Dillon, J. F., *op. cit.*, vol. III, p. 2199, sec. 1315.

years, specified in the grant. When this time limit has expired, the rights granted by the franchise are at an end, although the grantee may, and usually does, possess a large amount of property, valuable only for the purpose of furnishing the service it was designed to render. Franchises are not always renewed upon their expiration, and in cases where no renewal is made questions are sometimes raised as to the status of this property. With this and allied questions this group of cases deals.

In 1913 the city council of Mitchell, South Dakota, passed an ordinance terminating the right of a telephone company to maintain and operate a local telephone system and requiring the removal of its poles and wires from the streets.[77] The company brought suit for an injunction claiming that the ordinance impaired the obligation of its franchise contract. The franchise had been granted in 1898 for a term of 15 years. The company had purchased the property from the original grantee and on the strength of the franchise had expended over $100,000 in improvements. The company claimed that it had complied with all of the requirements of the ordinance and had acquired a vested right to maintain and operate the telephone system. The Supreme Court held that this claim to a vested right was not sustained by the facts. The investment of the company was held to have been made by it with full knowledge of the limitations imposed by the franchise contract. Hence, no right to continue operation after the expiration of the time expressed in the grant could be presumed.

From Detroit, three cases involving similar questions, concerning the street railway system, have been presented to the Supreme Court for decision. The first of these was an action in equity by the city to have certain franchises adjudged to have expired and to require the street railway company to pay a temporary rental or vacate the streets occupied under the franchises.[78] The company denied that the franchise had expired, insisted that the demands of the city were illegal, and declined to pay the rental.

The principal contention of the company was that, even if the franchises had expired, they were silent on the question of the rights of the parties upon the termination of the grants, and implied contract was created that the railway and other property of the company should continue in place and in use for the public convenience, on reasonable terms,

[77] City of Mitchell *v.* Dakota Central Telephone Co. (1918) 246 U. S. 396; 62 L. ed. 793.

[78] Detroit United Railway *v.* City of Detroit (1913) 229 U. S. 39; 57 L. ed. 1056.

and that the action of the city impaired the obligation of this contract. Mr. Justice Day, who delivered the opinion of the court, said:

> A fair construction of the ordinance requires service at the rates fixed only while the railway had a lawful right to use the streets by grant from the city. Nor do we find more force in the claim of an implied contract to permit the railway to remain on the streets under such reasonable arrangements for public service as the situation might require. At the expiration of the grants the rights thus definitely granted terminated by force of the terms of the instrument. The railway took the several grants with knowledge of their duration, and accepted and acted upon them with that fact clearly and distinctly evidenced by written contract. The rights of the parties were thus fixed and cannot be enlarged by implication. We are of the opinion that a street railroad, which is authorized to operate in the streets of a city for a definite and fixed time and has enjoyed the full term granted, may be required, within a reasonable time, to remove its tracks and other property from the streets.

The city council of Detroit later passed an ordinance establishing a schedule of rates for street-car fares. The street-car system to which the ordinance was sought to be applied included a considerable mileage of tracks upon which the franchises, including fare contracts, had expired. Upon other portions of the system there were unexpired franchises, some of them derived from villages in which the roads were constructed, which villages had been subsequently incorporated into the city. The company resisted the ordinance on the ground that, as to those lines upon which valid franchises still existed, it impaired the obligation of a contract.[79] The court sustained the company's view.

A third case from Detroit was decided eight years later. It was a bill for an injunction brought by the same street railway against the city to restrain it from acquiring or constructing a municipal street railway system. The grounds alleged were similar to those urged in 1913, and in addition the company claimed to have acquired new property rights in the streets upon which its franchises had expired because of certain day-to-day agreements by which continued operation was permitted, notwithstanding the expiration of contract rights.[80] The company further alleged that the officials of the city were estopped from denying the franchise rights of the company because of expenditures of large sums of money by the company with the knowledge and acquiescence of the city after the franchises expired.

[79] Detroit United Railway Co. *v.* City of Detroit (1919) 248 U. S. 429; 63 L. ed. 341.

[80] Detroit United Railway *v.* Detroit (1921) 255 U. S. 171; 65 L. ed. 570.

The court held that the agreements gave the company no contract rights, because it was expressly provided that the permits might be revoked, and that action under the agreements should not waive the rights of either party. With reference to the plea of estoppel, the court found that the state constitution prevented the acquisition of rights in this manner, as franchise grants might be made only with the approval of three-fifths of the voters and no vote had yet been taken. The bill was dismissed on the authority of the 1913 case.

In *Bankers Trust Co. v. City of Raton*[81] the trust company, which was trustee for the bondholders of the waterworks company, sought to enjoin an alleged aggression by the city upon the company on the ground of impairment of contract obligations. The city and company had entered into a contract in 1891 for a twenty-five-year franchise to furnish water. The term of the contract having expired, the city ordered the company to remove its system. In order to maintain service the city took over the company's reservoirs and instituted proper action to condemn them. Between the filing of the bill in the case and the hearing before the Supreme Court, the condemnation proceedings were completed.

The company claimed a perpetual franchise, which was held not to exist, and the company was held estopped to deny its twenty-five-year franchise by reason of its express contract with the city. The court pointed out that the term of the franchise had expired when the amended bill was filed. The term having expired, necessarily all the rights granted expired, and the city could not be enjoined from requiring the removal of the company's system from the streets of the city. Whatever rights of property the appellant may have had in its reservoirs and on the land upon which they were located were held to be a proper subject for other actions if the city asserted rights to them that had not been adjudicated.

h. *Effect of Suspensive Conditions Upon Franchise Contracts*

Two cases in which contract rights were asserted and denied because of the operation of a suspensive condition have arisen from transactions to which the city of New Orleans was a party. The first of these concerned a franchise grant to a railway company to construct its line into the city.[82] This grant was made upon the condition that the company should establish a ferry across the Mississippi with a landing at the city

[81] (1922) 258 U. S. 328; 66 L. ed. 642.

[82] New Orleans *v.* Texas & Pacific Ry. Co. (1898) 171 U. S. 312; 43 L. ed. 178.

park. The improvements were to be made within two years. Due to a failure of the company to comply with the conditions, the city council repealed certain sections of the original grant. The company then attempted to restrain the city from enforcing this repealing ordinance, claiming that its rights had become vested. Although the lower courts agreed with the contentions of the railroad company, the Supreme Court reversed the decrees, holding that as all the rights granted were subject to a suspensive condition it was manifest from the testimony that the company was not entitled to enjoy them.

The second case also concerned an ordinance grant to a railroad company. This time it was a franchise to construct a part of a belt-line system.[83] The belt line was to occupy, for a part of its distance, land which was the property of the city for public wharf purposes. The dock board which had control of this property gave its consent to its use for railroad purposes so long as the belt railroad was operated and controlled by a public commission. Subsequently another ordinance was passed granting a right of way over a portion of the belt line to another railroad company provided that it should construct at its own expense and dedicate to public use certain projected tracks from the end of the existing line. The validity of this ordinance was challenged in the state courts and it was held valid; but the dock board succeeded in having it annulled so far as it purported to grant rights over property subject to its jurisdiction. While the dock board's suit was pending another ordinance was passed granting similar rights to the plaintiff upon condition that it should build the line if the first grantee did not without legal excuse, or in lieu thereof should pay the city $50,000. The plaintiff accepted the ordinance. In the following year the grant to the other railroad was held invalid as has already been noted. This gave the first company a legal excuse for its failure to build the line, and the plaintiff by posting $50,000 claimed to have completed its contract. By this time, however, the city had decided to build and operate its own belt line and resisted the attempt of the railroad to assert any rights over the right of way along the wharves.

The Supreme Court pointed out that if there were a legal excuse for the failure of the first company to complete its contract it was plainly desirable that neither party should be bound by the second one. The contract was subject to a suspensive condition and the event in

[83] Louisana R. & N. Co. *v.* Behrman (1914) 235 U. S. 164; 59 L. ed. 175.

which the obligation was to arise did not happen, hence the contract was never complete.

i. *Effect of Annexation Upon Contract Rights*[84]

The next group of cases deals with the effect of the annexation of one municipality by another upon the subsisting franchises of the corporation which is absorbed. This first case to be noted arose through a petition for a writ of mandamus to compel a water company to furnish water to an individual at the rates established by an ordinance of the city of Chicago. The water company answered that this Chicago ordinance, if given effect, would impair the obligation of a contract between the water company and the village of Rogers Park, which had been annexed by the city after the granting of the franchise by the village to the company.[85]

The law in effect in Illinois at the time the franchise was granted did not permit municipalities to contract away the power to fix reasonable rates. The monopoly granted by the charter of the water company was held to be probably necessary to induce the investment of capital, but there was no such inducement for an unalterable rate. A reasonable rate the law assured, even against governmental regulation. Hence no contract as to rates was held to exist.

In several cases, the Supreme Court has been called upon to decide whether or not the extension of the boundaries of a city automatically extended a contract as to rates for public utility service over the new area. The opinions in these cases reach the same conclusion—namely, that to force a utility company to grant the rates to a new territory would impair the obligation of a contract.

The Detroit street railway company was convicted of failing to accept workmen's tickets on its lines within certain annexed territory. The state courts interpreted the fare contracts calling for this type of tickets to have been intended to apply to the city as its limits might from time to time be extended. The United States Supreme Court held that they applied only to the city as its limits existed at the time of signing the contract.[86] The lines in the annexed territory had been secured by the company through purchase of existing surburban lines each of which had a franchise contract with the villages through which it ran. The court pointed out that this acquisition of property included acquisi-

[84] See 12 C. J. 1014; Dillon, J. F., *op. cit.*, p. 2143.

[85] Rogers Park Water Co. *v.* Fergus (1901) 180 U. S. 624; 45 L. ed. 702.

[86] Detroit United Railway *v.* City of Detroit (1916) 242 U. S. 238; 61 L. ed. 268.

tion of franchises, and that these franchises continued for their full term regardless of the annexation of these areas by the city. It was said that construction of lines by the company in this territory after annexation might have produced a different situation.

The next case involved a contract as to fares between a street railway company and the town of Decatur, Georgia. The city by an extension of its limits brought in an additional section of the line. The contract called for a five-cent fare and the city sought to compel the company to extend this fare to the new area.[87] The Supreme Court held that to apply the five-cent fare to the annexed area would impair the obligation of a contract.

j. *Are Contracts of Military Authority Binding Upon Civil Authority?*

The obligation of a contract made under military authority with reference to public property under its control may be enforced against the civil government which succeeds it according to *City of New Orleans v. New York Mail S. S. Co.*[88] During the military occupation of New Orleans, until 1866, it was governed by authorities appointed by the commanding general of the department. In 1865 the mayor executed to the appellees a lease for certain waterfront property belonging to the city. The lease was for the exclusive use of the premises for ten years. Upon the resumption of civil government the city authorities sought to interfere with the company in the enjoyment of its rights under the lease, claiming that the lease expired with the military occupation. The company sued for damages and claimed impairment of the obligation of its contract. The court declined to accept the city's view and said:

> We cannot agree that the lease terminated with the military jurisdiction. The city took the place of the United States and succeeded to all of its rights under the contract and to the enjoyment of the rental contracted for. The company became bound to the city in all respects the same as it was formerly bound to the government.

This is really a minority opinion as Mr. Justice Hunt wrote a separate opinion, Mr. Justice Field dissented, and Justices Clifford, Davis, and Bradley did not participate in the decision.

[87] Georgia R. & P. Co. *v.* Town of Decatur (1923) 262 U. S. 432; 67 L. ed. 1065; Georgia R. & P. Co. *v.* City of College Park, (1923) 262 U. S. 441; 67 L. ed. 1074, decided at the same time involves an identical situation.

[88] (1874) 20 Wall. 387; 22 L. ed. 354.

k. *Nature of Consideration for a Franchise Grant*

A case which illustrates the nature of consideration for franchise grants is presented in *City Ry. Co. v. Citizens Street R. R. Co.*[89] Here the Citizens Company sought to enjoin the City Company from interfering with the former in the operation of its street railway in the city of Indianapolis. The City Company claimed the right to construct new lines under a franchise granted in 1893. The Citizens Company contended that it was operating under a valid franchise granted for thirty years in 1864, and extended for an additional seven-year term in 1880. It further alleged that the city ordinance purporting to grant a franchise to the City Company was an impairment of the obligation of this franchise. It was suggested in reply that there was no consideration for the extension of seven years and hence that the extension was void. The court said:

> Questions of finance in which bonds which would have come due after the expiration of the franchise were involved were the principal reasons for the extension of the franchise. While this transaction cannot properly be termed a legal consideration for the ordinance, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. . . But however this may be, it seems to us that the continued operation of the road may itself be regarded as sufficient consideration for the extension of the franchise.

1. *Contracts Arising Out of Public Office*[90]

While a public office is a public trust and no person by election or appointment thereto acquires any contract right to the office or its emoluments, when official services have been performed, under an ordinance or statute fixing compensation, there arises an implied contract to pay for such services at the established rate, which may no more be impaired than a private commercial contract.[91] This rule is illustrated by the case of *Fisk v. Police Jury*.[92]

Fisk, an attorney, had served the parish of Jefferson, Louisiana as prosecutor under fixed compensation. He brought suit for the salary upon its non-payment, and having secured judgments, sought a writ of mandamus to compel the levy of a tax to pay them. The jury replied that under the new constitution of the state it was forbidden to levy

[89] (1897) 166 U. S. 557; 41 L. ed. 1114.

[90] See 12 C. J. 1016 ff.

[91] See supporting opinion of Mr. Justice Story in Dartmouth College *v.* Woodward (1819) 4 Wheat. 518 at 694.

[92] (1886) 116 U. S. 131; 29 L. ed. 587.

a tax sufficient to pay the running expenses of the parish and the judgments, too. The court said, "The provision of the constitution restricting the limit of taxation, as applied to the contract of the plaintiff, impaired its obligation by destroying the remedy." The levy of an adequate tax was therefore ordered to be made.

2. What is Impairment?

The obligation of a contract is the law which binds the parties to perform their agreement, the law in force at the time when, and the place where the contract is made, and which enters into and becomes a part of the contract.[93] To impair the obligation of a contract means to alter it so as to make the contract more beneficial to one party and less to another than by its terms it purports to be.[94] The degree of impairment is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judical power of the court to redress the wrong.[95]

While the obligation of a contract may be impaired by striking at the remedy, a violation of the obligation is not necessarily implied from a reasonable change in the mode of enforcing a contract. The remedy for the enforcement of a contract forms a material part of its obligation, and the existence of a remedy is essential to the value of a contract; but the remedy constitutes no part of the contract itself. It may be changed or modified at the will of the legislature. This power of the legislature is subject only to the restriction that it cannot be so

[93] Sturges *v.* Crowinshield (1819) 4 Wheat. 122; 4 L. ed. 529; Ogden v. Saunders (1827) 12 Wheat. 213; 6 L. ed. 606. That the obligation of a contract includes not only its express terms but also the laws in effect at the time and place it is made is forcibly brought to mind by a few cases in which impairment is alleged, but the city or state proves that the constitution or statutes reserved the right to make the alteration complained of. (For cases involving a constitutional reservation see San Antonio Traction Co. *v.* Altgelt (1906) 200 U. S. 304; 50 L. ed. 491; John H. Sears *v.* City of Akron (1918) 246 U. S. 242; 62 L. ed. 688. For a statutory reservation see Sioux City Street Ry. Co. *v.* City of Sioux City (1891) 138 U. S. 98; 34 L. ed. 898). See also 12 C. J. 1055.

In Old Colony Trust Co. *v.* City of Omaha (1913) 230 U. S. 100; 57 L. ed. 1410) the company sought to prevent the city from ordering the removal from the streets of the poles and wires and conduits of the Omaha Electric Light and Power Co. for whose mortgage bonds it was trustee. The city in its answer relied upon a reservation in the original franchise of a right to order such removal. The court, however, held that such a reservation merely prescribed the proper police power of the city and conferred no authority arbitrarily to interfere with the property as it had done in this case.

[94] Sturges *v.* Crowninshield, supra. See 12 C. J. 1056; also Burdick, C. K., *op. cit.*, p. 453.

[95] Farrington *v.* Tennessee (1878) 95 U. S. 679; 24 L. ed. 558.

exercised as to take away all remedy upon the contract or impose burdens or restrictions which will materially impair its value.[96]

The prohibition against impairment applies only to laws which are retrospective in their operation. Contracts are not impaired by laws passed prior to their formation. The states are free to legislate as to future contracts.[97] In order to come within the prohibition of the clause the impairment must have been by a law of the state which includes municipal ordinances, passed under proper authority, not a decision of a court, or the act of an administrative board or officer, corporation or individual.[98]

a. *How Far Are Contracts Subject to the Exercise of the Police Power?*[99]

In 1834 the city council of Richmond, Virginia, approved the location of a railroad line along a street in that city. In the approval a reservation was made that the city was not to be considered as parting with any power or privilege not necessary to the company for constructing the road. In 1870 the city charter was so amended as to confer wide police powers in the regulation of railroads. Under this authority, the city in 1873 passed an ordinance prohibiting the use of steam engines upon certain portions of the street occupied by the railroad. In 1874, action was begun to recover the penalty provided by the ordinance from the company because of its failure to observe its requirements.[100] The railroad company relied upon the unconstitutionality of the ordinance under the contract clause and the Fourteenth Amendment. The only question was whether or not the ordinance as

[96] Mason *v.* Haile (1827) 12 Wheat. 370; 6 L. ed. 660. When a municipality has been authorized by the state to enter into a contract to borrow money, the power of taxation to repay the amount so borrowed with interest may not be withdrawn before the payment is made or the needed amount secured without impairing the obligation of a contract. This would virtually be a denial of the only effective remedy unless another were substituted. (Mississippi & M. RR. Co. *v.* Rock (1867) 4 Wall. 177; 18 L. ed. 381; U. S. ex. rel. Hoffman *v.* City of Quincy (1867) 4 Wall. 535; 18 L. ed. 402; Mayor *v.* U. S. ex rel. Amy (1867) 5 Wall. 705; 18 L. ed. 560; U. S. ex. rel. Riggs *v.* Bd. of Supervisors (1868) 6 Wall. 166; 18 L. ed. 768.)

[97] Railroad *v.* McClure (1871) 10 Wall. 511; 19 L. ed. 997. See also 12 C. J. 988.

[98] Kryger *v.* Wilson (1916) 242 U. S. 171; 61 L. ed. 229. Any action by a state agency to which the state gives the force of law may be violative of the contract clause. 12 C. J. 989-990.

[99] For a general discussion and an extensive table of cases see 12 C. J. 992-3; Burdick, C. K., *op. cit.*, p. 471.

[100] Richmond F. & P. Ry. Co. *v.* City of Richmond (1878) 96 U. S. 521; 24 L. ed. 734.

passed by the council was a proper exercise of its powers. On this point this court said:

> It certainly comes within the express authority conferred by the city charter, but that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable police regulations.

The ordinance was held to be such a regulation.

The power of municipalities to make reasonable police regulations concerning railroad operation within their limits is further illustrated by a case from Omaha, Nebraska. The city sought to compel a certain railroad to repair, at its own expense, a viaduct which had been constructed to carry one of the city streets over the tracks of several railroads in the city. The company resisted the order on the ground that to compel it to make such repairs alone without requiring contributions from the city and the other railroads by which the viaduct was originally erected would impair the obligation of the contract under which the viaduct was built.[101]

The district court held that the ordinances under which the structure was built did not constitute a contract between the state and city and the company. The Supreme Court, however, exercising its right to use its independent judgment as to the existence of a contract, held that the agreement did constitute a contract. However, Mr. Justice Shiras, in the opinion said:

> Contracts of this description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that the parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

Hence the act of the legislature authorizing the city to impose the duty of repair upon one or more of the railroad companies and the ordinance passed by the city thereunder were held to be a valid exercise of the police power to which the contract could properly be subjected without impairing its obligation.

The city of Goldsboro, North Carolina, passed an ordinance making numerous police regulations with respect to the operation of a

[101] Chicago B. & Q. Ry. Co. *v.* State of Nebraska ex rel. City of Omaha (1898) 170 U. S. 57; 42 L. ed. 948.

railroad which ran on a space used as a public street through the heart of the city. The company maintained that its predecessors had acquired title to the land upon which its facilities were located in fee simple and that as the city had never condemned any of it or made compensation for its use as a street, the title was still absolute and beyond the power of the city to affect.[102]

The Supreme Court held that the railroad company had devoted its property to uses more or less inconsistent with the railroad uses and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. The right of way strip, 130 feet in width, so far as not occupied by the railroad tracks had been used for purposes of a street. This street had become the main business thoroughfare of the town, frequently crowded with pedestrians and vehicles. Under these conditions, the Supreme Court held that the state might legitimately exercise the police power. Mr. Justice Pitney, who delivered the opinion, said:

> Neither the contract nor the due process clause has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community. This power can neither be abdicated nor bargained away, and is inalienable even by express grant, and all contracts and property rights are held subject to its fair exercise.

The principles of the Goldsboro case were applied in a case arising from Denver, Colorado, a few years later.[103] The city sought by ordinance to compel a railroad company to remove a side-track from an important crossing. The company, among other objections, averred that such an ordinance was a violation of the contract clause. But the court held that franchise contracts and rights were held subject to the fair exercise by the state, or the municipality as its agent, of the power to adopt and enforce such regulations as were reasonably necessary to secure the public safety.

In two cases, an attempted regulation of a railroad through the exercise of an alleged police power has been held invalid. Both of these were decided in 1913. The first case involved an attempt by the city of South Bend, Indiana, to repeal a portion of an ordinance granting the right to lay a double track in a city street, so as to prevent

[102] Atlantic Coast Line R. Co. *v.* City of Goldsboro (1914) 232 U. S. 548; 58 L. ed. 721.

[103] Denver & R. G. R. R. Co. *v.* City and County of Denver (1919) 250 U. S. 241; 63 L. ed. 958.

the completion of such a double track, about half of which had been laid within the city limits. The railroad company claimed that the original franchise constituted an entire contract no part of which could be impaired by the city. The city averred that a double track would be a serious menace to the public safety and that the repeal had been made under its police power.[104]

The Supreme Court noted that the state courts already had held that the city had the power to make the original contract, in which there was no reservation of any right to amend or repeal. Although the right of the city to pass reasonable police regulations was recognized, the repealing ordinance was held not to be regulative of the use, but destructive of the franchise.

The second case was the result of an attempt by the city of Portland, Oregon, to make certain regulations with respect to the operations of a railway within its limits.[105] Under facts similar to those cited above in connection with the Richmond case,[106] the city granted to a railroad company the right to occupy a city street for railroad purposes. The ordinance making the grant reserved to the city the right to make regulations for the conduct of the road within the city limits and to prohibit the running of steam locomotives when deemed necessary. Nearly forty years later, the city council passed an ordinance prohibiting the operation of steam locomotives and freight cars on a certain part of the line, except freight cars used for the repair or maintenance of the railway. The only means of access to the terminal property owned by the railroad was over the portion of road upon which the operation of locomotives and freight cars was prohibited. The company resisted the enforcement of the ordinance on the ground that, among other things, it impaired the obligation of a contract. The lower court held the ordinance valid as a reasonable exercise of the police power.

The Supreme Court, however, held that the ordinance granting the consent of the city to the occupancy of the street by the railroad company was proposed and accepted as an entire contract and as such was binding upon the railroad as well as the city. The power of regulation reserved in the ordinance was held to authorize the prohibition of the use of steam as motive power, as this would not defeat

[104] Grand Trunk Western Ry. Co. *v.* City of South Bend (1913) 227 U. S. 544; 57 L. ed. 633.

[105] Southern Pacific Co. *v.* City of Portland (1913) 227 U. S. 559; 57 L. ed. 642.

[106] See p. 94 supra.

the grant, other methods of locomotion being possible. But the prohibition of the use of freight cars was held unreasonable. The court said:

> If the city can prohibit the company from operating one set of cars it can prevent the use of another and under the power to regulate it could thus defeat the franchise granted by the state, and impair the contract under which the tracks were located.

A few cases have been decided respecting attempts to regulate street railway operation under the police power and the effect of such regulations upon contract rights. One of these arose in Baltimore out of an attempt by the city council to prevent the construction of double tracks in one of the city's most crowded streets. A grant had been made in 1891 authorizing the laying of double tracks and this had been ratified by the act of the legislature. In 1892 the company began to lay its tracks. The mayor caused the work to be suspended and secured the passage of an ordinance repealing that portion of the first one permitting double tracks and providing for a single track.

Action was then begun to determine whether or not the original ordinance granting right to lay a double track had been impaired.[107] The city sought to justify its action under the doctrine of overruling public necessity, stating that double tracks between the points in controversy would be inconsistent with a reasonable use of the street by the public.

The Supreme Court, in considering the case, did not enter into the question as to the power of the city to make an irrevocable contract on the subject. The direction to lay but one track as ordered by the city was held not substantially to change the terms of the contract, and was no more than an exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the railroad company. The original contract, assuming that one existed, was held to have been made subject to the right of the city to adopt such a regulation.

The city of Chicago sought by ordinance to compel a street railway company to lower, at its own expense, a tunnel owned and used by it under the Chicago River. The lowering of this tunnel was necessary to permit the deepening of the river for purposes of navigation by the United States War Department. The company objected to the ordinance on the ground that under the franchise which it had

[107] Mayor etc. of Baltimore *v.* Baltimore Trust and Guarantee Co. (1897) 166 U. S. 673; 41 L. ed. 1160.

procured from the city it could not be compelled to make such an alteration in the tunnel at its own expense. The ordinance was claimed to impair the obligation of this contract.[108]

The court failed to find any clause in the original contract which so restricted the power of the city that it could not require the company to lower or remove the tunnel when public interests, such as those involved in the unobstructed navigation of the Chicago River, demanded that this be done. There was no ground for holding that the city came under the obligation of a *contract* to meet the cost of any changes in the tunnel which might be lawfully required in order that the river could be safely navigated by large vessels.

An attempt by the city of Chicago to assess the property of a street railway for the construction of a new pavement eight feet in width along its line had a less favorable outcome from the standpoint of the municipality. The company pointed out that its franchise required it to bear the cost only of repairs to the pavement and that to assess it for new paving would impair the obligation of its contract.[109] In this the court agreed.

Other examples of an exercise of the police power as affecting contract obligations are included in the following cases. An electric light company in the city of St. Louis proceeded to make excavations in the streets for the purpose of laying conduits to carry electricity. The street commissioner ordered the work stopped because the company had not complied with the ordinance of the city concerning electric wiring and because the company had secured no permit for making the excavation. The company answered that it had a right under its charter to place its wires underground without reference to the city ordinances and without securing a permit, and, as the ordinances had been adopted since its charter was granted, if given effect they would impair the obligation of the charter contract.[110] Mr. Justice Fuller, speaking for the court, said:

> Considering the danger to life and property from electric wires when charged, it seems to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised. Further, many companies use electric wires for various purposes, and, to accommodate them all, and to prevent monopolies, it appears necessary that the municipal authorities should have the right to

[108] West Chicago Street Railroad Co. *v.* Peo. ex. rel. City of Chicago (1906) 201 U. S. 506; 50 L. ed. 845.

[109] City of Chicago *v.* Sheldon (1870) 9 Wall. 50; 19 L. ed. 594.

[110] State ex rel. Laclede Gaslight Co. *v.* Murphy (1898) 170 U. S. 78; 42 L. ed. 955.

> direct the manner in which wires should be placed underground. . . . We concur in the conclusion of the (state) supreme court that the company was subject to reasonable regulations in the exercise of the police powers of the city. . . .

A similar question was raised in New York City by an application of an electric light company for a writ of mandamus to compel the issuance to it of a permit to place wires underground. The application for the writ was denied on the ground that the company had not secured approval of its plans by the commissioners of electrical subways as required by law. The company claimed that as the law creating this commission had been passed after the granting of its charter it would impair the obligation of its charter to require it to comply with the procedure set forth in it.[111]

The court held that no state law had conferred upon the company any right to construct its lines wherever and in whatever manner it chose. The statute did not prohibit the company from carrying out the purposes of its organization or from laying its wires underground. It merely provided a definite board to which the plans and specifications should be submitted for approval. The court said:

> It would be an anomaly in municipal administration if every corporation that desired to dig up the streets and make underground connections should be allowed to proceed upon its own theory as to what were proper plans for it to adopt and proper excavations to make. It requires no argument or citation of authority to show that such proceedings (as those prescribed in the law) do not impair the obligation of the relator's contract.

In still another case the power of a municipality over the placing of poles and stringing of electric wires in the streets was involved. An electric company which had been furnishing light for the streets and also for commercial purposes failed to come to any agreement with the village as to proper charges for street lighting service. Its franchise had expired so it took down all poles and wires used in street-lighting service. It proceeded, however, to maintain its commercial service and threatened to install additional poles and wires to extend this service. The village applied for an injunction to restrain such construction of new lines until the consent of the village council had been obtained in accordance with the state law.[112]

[111] Peo. ex rel. New York E. L. Co. *v.* Squire (1892) 145 U. S. 175; 36 L. ed. 666.

[112] Hardin-Wyandot Lighting Co. *v.* Village of Upper Sandusky (1919) 251 U. S. 173; 64 L. ed. 210.

The company in its answer referred to an earlier state law which had provided for the settlement of rate disputes by the judge of probate on failure of a company and municipality to agree. This act was in effect when the franchise ordinance was passed and the company claimed that it had entered into and become a part of the contract. So, as to it, the subsequent state law vesting authority in such matters exclusively in the municipal council was an impairment of the obligation of its contract.

While the later law might have been upheld upon the theory that the right relied upon by the company was remedial only, the court rested its decision upon the ground that the change was a valid exercise of the police power of the state. The court said:

> We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for the exercise of the police power, and very certainly the authorities of the municipality immediately interested in the safety and welfare of the citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law, passed in a reasonable exercise of the police power, does not constitute an impairing of the obligation of its contract with the state or village.

In *Russeell v. Sebastian*[113] the city of Los Angeles sought to restrain a gas company from laying its pipes in a street without first securing a franchise from the city. The company answered that it was authorized to lay pipes by the constitution of the state and that to require it to secure a franchise before extending its lines would impair the obligation of its contract with the state.

The court found from the evidence that before 1879 in California the right to lay pipes in city streets had been derived from a grant from the legislature. Experience had procured the conviction that this authority was abused. In order to terminate these evils the unique plan was devised of making street franchises the subject of direct grant by the constitution. This was the purpose and effect of Section 19 of Article 11 of the California Constitution of 1879, as was decided by the Supreme Court of California. The Supreme Court said, "When the voice of the state declares that it is bound if its offer is accepted, and the question is simply as to the scope of the obligation, we should be slow to conclude that only a revocable license was intended." The contention of the city that the constitutional

[113] (1914) 233 U. S. 195; 58 L. ed. 912.

grant extended only to streets actually occupied at the date of the adoption of the constitution was denied. The privilege was held to authorize not only pipes already laid but also additional pipes in other streets so far as they might be required to effect an adequate distribution. The duty and right of a public utility to serve were held sufficient to justify reasonable extensions to accommodate the requirements of the community. The only limitation upon the grant was that the installations should be supervised by the municipality in which they were made. The company in the present case had requested this supervision. The court therefore concluded that the ordinances of the city were ineffectual to impair the right of the company to extend its mains subject to reasonable regulations.

Another case concerning the power of a municipality to revoke a franchise right arose out of an attempt by the council of the city of Owensboro, Kentucky, to repeal an ordinance granting a telephone franchise.[114] The franchise was granted in 1889 without limitation as to time, although a section provided that the ordinance might be repealed or amended at any time. In 1909 the council passed an ordinance requiring that the company remove its poles and wires from the streets, but provided that it should have the right to purchase from the city a franchise authorizing it to maintain the poles and wires, and use the same as provided under the laws of the state, upon proper conditions, to be prescribed by an ordinance, to be passed upon request of the company to the council. The company sought to restrain the enforcement of the ordinance alleging its repugnance to the contract and due process clauses of the Constitution. The court in its opinion held that the right conferred by the ordinance of 1889 was more than a mere license. It was neither personal nor for a temporary purpose. The court said:

> The grant by ordinance to an incorporated telephone company of the right to occupy the streets and alleys of a city with its poles and wires is a grant of a property right in perpetuity unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property right. . . . The city had power to grant the franchise to the company.

[114] City of Owensboro *v.* Cumberland Telephone & Telegraph Co. (1913) 230 U. S. 58; 57 L. ed. 1389.

The city insisted that the life of the grant could not exceed the life of the corporation which accepted it. The company was originally incorporated for twenty-five years, but had extended its corporate existence under general law and charter provisions. The court said on this point, "A corporation is capable of taking a grant of street rights of longer duration than its own corporate existence." The city next urged that the power to grant the franchise was coupled in the charter with the power to amend or repeal. To this the court said:

> The power to be a corporation and conduct a telephone business did not come from the city, nor could it. The only thing which the ordinance pretends to do is to grant an easement in the streets. . . . This repealing ordinance, although it purports to be an exercise of the police power, proceeds immediately to contradict the assertion that the poles and wires are a nuisance by the proviso giving the company an opportunity to purchase the right to continue the use of the streets under conditions to be prescribed by ordinance. It is a plain attempt to destroy the vested property right under which a great plant had been installed and operated for more than twenty-five years. . . . Although the ordinance provides that it may be altered or amended . . . this was no more than a reservation of the police control of the streets. . . . To construe a general power of repeal as a reservation of power to revoke or destroy contractual rights would be to place every contract made by a city by virtue of an ordinance, legislative in form, subject to the mercy of the city council. . . . We think no such extraordinary power is to be implied.

The city of Cleveland, by an ordinance adopted in 1904, attempted to grant to a street railway a franchise to use certain streets whose use had been granted previously to another street railway company. The latter brought application for an injunction to restrain the enforcement of the ordinance upon the ground that it impaired the obligation of its contract right to use the streets in question.[115] The city maintained that these older franchise rights had expired. The company contended that they had been extended. The court adopted the company's view, holding that the older grant was subsisting and valid and that the ordinance would impair it if permitted to go into operation.

One of the objections urged by a billboard company to an ordinance of the city of St. Louis regulating the business of bill posting and prescribing specifications for the construction of billboards was that the ordinance impaired the obligation of numerous contracts between the company and its customers.[116] The ordinance was upheld by the

[115] City of Cleveland *v.* Cleveland E. R. Co. (1906) 201 U. S. 529; 50 L. ed. 854.

[116] St. Louis Poster Adv. Co. *v.* City of St. Louis (1919) 249 U. S. 269; 63 L. ed. 599.

Supreme Court which made the following statement concerning the contracts: "As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it, they were subject to police legislation not invalid otherwise than for its incidental effect upon them."

b. *When May Public Utility Rates be Fixed Without Impairing a Contract?*[117]

The next group of cases deals with the power of municipalities to fix rates of public service corporations, and the effect of such rate-fixing upon existing contracts. In two cases such regulations were upheld; in four they were held invalid.

In the first case the city of Freeport, Illinois, sought by ordinance to reduce the amount which might be charged to it by a water company for hydrant rental. The company refused to consent to or recognize the reduction in rates claiming that the ordinance violated the obligation of a contract.[118] The state supreme court in deciding the case in favor of the city considered that the charter under which the company was incorporated reserved to the general assembly the power to make such further rules and regulations as it might deem desirable. The company, on the other hand, contended that this provision was not intended to reserve power to interfere with the internal business management of the corporation. The United States Supreme Court considered such a construction too narrow.

Assuming, however, that the company was correct in its interpretation of its charter, the court came to a consideration of whether or not the city had been empowered to make an irrevocable contract as to rates. The state supreme court decided that it had not. Mr. Justice McKenna, speaking for the court, said:

> The words 'fixed by ordinance' can be construed to mean by ordinance once for all to endure during the whole period of thirty years (the term of the franchise) or by ordinance from time to time as might be deemed necessary. Of the two cnstructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

Hence, the power to alter rates was recognized to exist.

[117] For a general discussion of the problem and further cases involving state statutes see 12 C. J. 1034-5; Dillon, J. F., *op. cit.*, vol. III, p. 2336, sec. 1326; McQuillin, E., *op. cit.*, vol. IV, p. 3709, sec. 1737; Burdick, C. K., *op. cit.*, pp. 464-468.

[118] Freeport Water Co. *v.* City of Freeport (1901) 180 U. S. 587; 45 L. ed. 679.

Another case, *Danville Water Co. v. Danville*[119] was decided at the same time with the same result.

A water-rate case presented a few years later involved an ordinance of the city of Knoxville, Tennessee.[120] The water company had been incorporated in 1882 under a general law which provided, among other things, that the act should in no way interfere with or impair the police or general powers of the corporate authorities of any city, and that such corporate authorities should have power by ordinance to regulate the price of water supplied by the company. In 1882 the company entered into a contract with the city whereby it acquired an exclusive franchise for thirty years to furnish water. As a part of this contract the company undertook to supply private consumers with water at a rate not to exceed five cents per 100 gallons. The city later passed an ordinance to regulate rates fixing a different figure, and the company refused to be bound by it, maintaining that it impaired the obligation of its contract. The mention of rates in the contract was relied upon as constituting an implied contract on the part of the city not to interfere with the company in establishing rates within the contract limits. Mr. Justice Holmes, who delivered the opinion of the court, said:

> The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication.

In answer to some argument attempted as to the ordinance impairing the obligation of contracts between the company and its consumers, the court said:

> But such contracts, of course, were made by it subject to any power the city possessed to modify rates. The company could not take away that power by making such contracts. In any event, the contracts themselves are agreements to pay for the water in accordance with the rates now or hereafter in force.

An attempt of the city of Owensboro, Kentucky, to fix water rates, under a state statute, was upheld against the contention that it impaired the obligation of a contract, in *City of Owensboro v. Owensboro Water Co.*[121] The circuit court interpreted the charter powers

[119] (1901) 180 U. S. 619; 45 L. ed. 696.

[120] Knoxville Water Co. *v.* Mayor etc. of Knoxville (1903) 189 U. S. 434; 47 L. ed. 887.

[121] (1903) 191 U. S. 358; 48 L. ed. 217.

of the city as permitting it to regulate rates only in case the plant were owned and operated by the city. The Supreme Court placed a different interpretation upon the charter and upheld the city's regulatory power over the privately owned water plant. Further, the court held that the franchise conferred on the company only power to make rules and regulations. This, said the court, did not include power to fix rates inconsistent with valid law. The city was held to have ample authority for its rate ordinance and it was upheld.

An ordinance of the city of Los Angeles was attacked by a water company as impairing the obligation of a contract as to rates between it and the city. In 1868 a contract was entered into which provided that the mayor and council should reserve the right to regulate the water rates charged by the company, provided that they should not so reduce such water rates below the amount then charged by the company.[122] The city in 1897 passed an ordinance fixing lower rates. The company alleged that this impaired the contract. The court found that it did so and set aside the ordinance.

A similar contract as to rates of fare for a street railway was held to be valid and to be protected by the Constitution against impairment in *City of Detroit v. Detroit Citizens Street Railway Co.*[123] The court in referring to the power to make such contracts said:

> It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, but there can be no question as to the competency of a legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract, so as to bind during a specified period any future common council from altering or in any way interfering with such contract.

The council of the city of Minneapolis, Minnesota, sought to reduce the fare on the local street railway system from five cents to six tickets for twenty-five cents. Upon consideration of the facts the court found that the company possessed a valid contract right to charge a five-cent fare for fifty years from 1873.[124] The city ordinance consequently was held void and its enforcement was enjoined.

Another case presenting the same point is *City of Cleveland v.*

[122] City of Los Angeles *v.* Los Angeles City Water Co. (1900) 177 U. S. 558; 44 L. ed. 886.

[123] (1902) 184 U. S. 368; 46 L. ed. 592.

[124] City of Minneapolis *v.* Minneapolis Street Railway Co. (1910) 215 U. S. 417; 54 L. ed. 259.

Cleveland City Ry. Co.[125] Here contracts were found to exist as to rates of fare and a city ordinance purporting to provide a different rate was held void.

c. *How Far Are Contracts Subject to the Power of Eminent Domain?*[126]

In 1775, the legislature of Vermont passed an act granting a franchise for the building of a toll bridge over the West River in Brattleboro. The franchise was for 100 years and was exclusive for four miles from the place designated. In 1839 an act was passed permitting the condemnation of such bridges and their opening for free public use. In 1842 a petition for such condemnation was filed. In 1843 appraisers awarded the company $4000 for its franchises and property. In November, 1843, the award of the appraisers was affirmed and the bridge ordered opened for free travel.

The company appealed from the judgment on the ground that the proceedings impaired the obligation of its contract with the state.[127] The Supreme Court held that the charter did, indeed, constitute a contract with the state which the latter could not impair. But, it was pointed out that a franchise is property and nothing more, and, as such, liable to be taken for public use on the payment of compensation. Mr. Justice Daniel, who delivered the opinion of the court, said in part:

> In every political sovereign community there inheres necessarily the right and duty of guarding its own existence, and of protecting the interests and welfare of the community at large. This power denominated 'eminent domain' of the state is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The Constitution of the United States can by no rational interpretation be brought into conflict with this attribute in the states.

A second case under this head is *Long Island Water Supply Co. v. City of Brooklyn.*[128] The water company was organized under a general law and in 1881 entered into a contract with the town of New Lots by which it agreed to supply water. The town granted a

[125] (1904) 194 U. S. 517; 48 L. ed. 1102.

[126] See also Pennsylvania Hospital *v.* City of Philadelphia (1917) 245 U. S. 20; 62 L. ed. 124. See also 12 C. J. 993, and 12 C. J. 1041 ff, Burdick, C. K., *op. cit.*, p. 461.

[127] West River Bridge Co. *v.* Dix (1848) 6 How. 507; 12 L. ed. 535.

[128] (1897) 166 U. S. 685; 41 L. ed. 1165.

franchise and contracted for twenty-five years for water for fire protection. In 1886 the town was annexed to the city of Brooklyn. The act of annexation specifically mentioned this water contract and protected it. By Section 5 of this act the city was given power to purchase or condemn the property of the company within two years, but it did not take advantage of this privilege. In 1892 the legislature passed another act authorizing the city to condemn the property. This time the city acted and the plant and franchise including the contract with the town of New Lots were valued for condemnation. The appraisers' report was finally approved by the state courts, but the company sued out a writ of error to the United States Supreme Court on the ground that the condemnation proceedings impaired the obligation of its contract. Mr. Justice Brewer, who delivered the opinion of the court, said in part:

> Whenever public use is required, the government may appropriate any private property upon the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted. It matters not to whom the water system belongs, or what franchises are connected with it. All may be taken for public use upon payment of just compensation. The contention is practically that the existence of a contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain. The vice of this argument is twofold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter, which, being fit for public use, is condemned. . . Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses.

The city of Cincinnati objected to the condemnation by a railroad company of a right of way across its public levee. The company had adequate statutory authority to exercise the power of eminent domain. The city claimed that to permit the condemnation would impair the obligation of the contract for the perpetual public use of the levee between the original proprietors and the public.[129]

The court conceded the existence of the contract between the city and the dedicators, but pointed out that such a contract was subject to the power of eminent domain. Upon this basis the power of the railroad company to condemn the right of way was upheld.

[129] City of Cincinnati v. Louisville & N. R.R. Co. (1912) 223 U. S. 390; 56 L. ed. 481.

d. *The Relation Between the Power of Taxation and the Contract Clause*[130]

In *Murray v. City of Charleston*[131] the city attempted by ordinance to levy a tax for city purposes upon such of its bonds as were held by non-residents. The payment of the tax was to be enforced by withholding a portion of the interest payment. The bondholders objected to the tax on the ground that it impaired the obligation of a contract. The court, speaking through Mr. Justice Strong, said:

> Debts are not property. A non-resident creditor cannot be said to be, in virtue of a debt due him, a holder of property within the city, and the city council was authorized to make assessments only upon the inhabitants of Charleston or those holding taxable property within the same. . . . The obligation undertaken was to pay the interest at the rate specified and to pay it to the plaintiff. . . . The city ordinances, if they have any force, change both the form and effect of this undertaking. . . . Until the payment of the debt or interest has been made as stipulated we think no act of state sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him, without a violation of the constitution.

e. *What Constitutes "Passing a Law?"* [132]

It will be recalled that the contract clause protects contracts only against the passage of a law impairing their obligation. In several cases, there was no constitutional question because no law had been passed within the meaning of the Constitution. As contracts are always made subject to the existing law at the time and place of their formation, no law passed before the formation of a contract can be said to impair its obligation. It is only when a law is passed which affects existing contracts that impairment is possible.

One of the pleas relied upon in *Fifth Avenue Coach Co. v. City of New York*[133] was that the ordinance of the city which forbade the operation upon the streets of vehicles bearing advertising signs impaired the obligation of a contract. The company claimed the right under its franchise for the use of the streets, to sell advertising

[130] See Dillon, J. F., *op. cit.*, vol. IV, p. 2319, sec. 1354; McQuillin, E., *op. cit.*, vol. II, p. 1638, sec. 758.

[131] (1878) 96 U. S. 432; 24 L. ed. 760.

[132] For a general discussion and cases involving state statutes see 12 C. J. 988 ff.; as to ordinances as law see McQuillin, *op. cit.*, vol. II, p. 1632, sec. 754. See also King Mfg. Co., *v.* City of Augusta (1928) 277 U. S. 100; 48 Sup. Ct. Rep. 489; 72 L. ed. 801.

[133] (1911) 221 U. S. 467; 55 L. ed. 815.

space on its buses as a necessary adjunct to its business. The court disposed of this contention by pointing out that when the franchise was made there was an ordinance in effect which prescribed almost the same regulation. Hence, it was held there could be no impairment.

Resolutions and ordinances usually are not identical in effect, although a resolution passed with all of the formalities of an ordinance may be held to have the same effect as an ordinance. Thus, while an ordinance may be considered as a state law under the contract clause, a resolution which does not have the force of law cannot be objected to as impairing the obligation of a contract. Several cases illustrate this point.

The Supreme Court in *Defiance Water Co. v. Defiance*[134] refused to take jurisdiction of a case under the commerce clause where the alleged impairment involved merely a resolution of the council. In *City of Des Moines v. Des Moines City Railway Co.*[135] a similar point was presented. Here the court said:

> We are of the opinion that this (resolution) is not a law impairing the rights alleged by the appellee. . . . Leaving on one side all questions as to what may be done by resolution, as distinguished from ordinance, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's view.

In *St. Paul Gaslight Co. v. City of St. Paul*[136] the court declined to interpret an ordinance of the council as a law which could impair the obligation of the company's contract. It was held that the ordinance neither created any new right nor imposed any new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city. "It was but a denial by the city of its obligation to pay. This denial, while embodied in an ordinance, was no more efficacious than if expressed in any other form."

A similar situation is presented in *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*[137] Here the waterworks company brought action to restrain the sugar refining company from laying water pipes in the streets of New Orleans on the ground that the waterworks company was the holder of an exclusive franchise to

[134] (1903) 191 U. S. 184; 48 L. ed. 140.
[135] (1909) 214 U. S. 179; 53 L. ed. 958.
[136] (1901) 181 U. S. 142; 45 L. ed. 788.
[137] (1888) 125 U. S. 18; 31 L. ed. 607.

furnish water to the city and to its inhabitants. There was an exception in the franchise which reserved the right to the city to grant permission to persons whose property was contiguous to the river, to lay pipes to secure a water supply for themselves. The refining company answered that its property was contiguous to the river, that the pipes which it had laid were solely for the purpose of supplying water to its plant, and that they were laid under authority of an ordinance of the city council. The plant of the refining company was separated from the river only by a street. The waterworks company then requested that the trial court instruct the jury that the city had no authority to pass the ordinance as the refining company was not contiguous to the river. This instruction was refused and the jury rendered a verdict for the defendant. The waterworks company carried the case to the United States Supreme Court on the ground that the ordinance, if given effect, would impair the obligation of its franchise. Mr. Justice Gray, who delivered the opinion of the court, said:

> This court is not authorized to consider whether or not the factory of the company is contiguous to the river. . . . The ordinance in question involves no exercise of the legislative power. . . . All that was left to the council (by the franchise) was the duty of determining what persons came within the definition and how and where they might be permitted to lay pipes. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. The permission granted by the city council to the company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state.

But eight years after deciding the case just reviewed the Supreme Court reversed its position as to the nature of these grants. The waterworks company sought an injunction to prevent the abuse of the council's privilege of deciding what property was contiguous to the river as permitted by the preceding case.[138]

The court, in its opinion, pointed out first that the matter could not properly be litigated as to the past ordinance grants unless the beneficiaries of the grants were made parties to the action. Then, turning to the question of future grants, the court said:

> If it be said that a final decree against the city enjoining it from making such grants in the future will tend to protect the plaintiff in his rights, our answer is that a court of equity cannot properly interfere with

[138] New Orleans Waterworks Co. *v.* City of New Orleans (1896) 164 U. S. 471; 41 L. ed. 518.

> or in advance restrain the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it cannot do directly. . . . The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.

While this is obviously a correct statement of law, it is worthy of remark that the court should have stated only eight years after it had declared that these grants were administrative licenses, that they were legislative acts!

While the Supreme Court has never had occasion to pass directly upon the question as to whether or not an *ultra vires* ordinance is a law which might impair the obligation of a contract, the matter is referred to by way of dictum in *Hamilton Gaslight & Coke Co. v. City of Hamilton.*[139] The court said:

> A municipal ordinance, not passed under proper legislative authority cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.

The reason for this conclusion should be clear. An *ultra vires* ordinance is void *ab initio.* Hence no impairment could have occurred as there was never a law passed. But as all questions of the power of municipal corporations to pass ordinances are matters of state law, the Supreme Court seldom has an opportunity to consider whether this type of legislation is valid or not.

Finally, a mere breach of contract by one of the parties does not constitute impairment within the constitutional prohibition.[140] For such a breach the law gives a remedy—usually in damages. But a breach involves the passing of a law—and the passage of a law by the state, in the form of a constitution, statute, or municipal ordinance, is essential to impairment within the meaning of the contract clause.[141]

[139] (1892) 146 U. S. 258; 36 L. ed. 963. See also note 51, 12 C. J. 989.

[140] See note 48, 12 C. J. 1011.

[141] Although numerous cases may be found in the decisions involving the validity of municipal contracts as represented by their negotiable bonds, very few of these are decided under the contract or due process clauses. The few which do involve a question of impairment or due process have been included in their proper place in this and the following chapter. As the others have been decided principally upon rules of common law as to negotiable instruments, and not as matters of constitutional law, they have been omitted.

Several cases have been decided respecting the liability of municipal corporations upon their contracts, but not involving impairment. For sake of completeness these cases are listed with a brief statement of the point involved in each:

(1) Clark *v.* Mayor (1827) 12 Wheat. 40; 6 L. ed. 544, held the city of Wash-

Two cases illustrate this point. The first of these was a suit to enjoin municipal officers from violating a contract to take over the laterals of a drainage company.[142] The court said, "A simple breach of contract is alleged on the part of the city. We are pointed to no law impairing the obligation of the contract."

In the second case, the breach was on the part of the plaintiff, who claimed that he nevertheless was qualified to enforce the contract against the city.[143] Here the plaintiff was the trustee for the bond-

ington, D. C., liable to pay a prize on a lottery ticket in a lottery authorized by it, which was not paid by its agent according to his contract.

(2) Shankland *v.* Mayor (1831) 5 Pet. 390; 8 L. ed. 166, held the city of Washington, D. C., not liable to a purchaser of a part interest in a prize winning lottery ticket. The contract was held to be between the holder of the ticket and the purchaser of the part interest. The corporation's only liability was to the holder of the ticket.

(3) Thomas *v.* City of Richmond (1871) 12 Wall. 349; 20 L. ed. 453, held the city not liable to pay circulating notes issued by it during the Civil War to circulate as money. Issue held to be against public policy as well as against express law. As receivers were equally guilty they could not maintain action for money had and received.

(4) City of Richmond *v.* Smith (1873) 15 Wall. 429; 21 L. ed. 200, held city liable to pay damages for stocks of liquor destroyed by order of the council just prior to the surrender of the city to the federal forces—implied contract. Bradley, J., dissented on ground that destruction was act of war, and no contract of such nature had any validity after collapse of Confederacy.

(5) City of Memphis *v.* Brown (1874) 20 Wall. 289; 22 L. ed. 264, held that return of bonds loaned by city to contractor could not be enforced at par value, but only price received by contractor when he sold them.

(6) Jefferson City G. L. Co. *v.* Clark (1877) 95 U. S. 644; 24 L. ed. 521, held that a guaranty of the payment of the principal of bonds included a guaranty of payment of interest as well. Bonds issued to a private corporation, if for a public purpose, are valid. The legislature may impose a debt upon a city without its express consent, when an equitable claim existed before. (City of New Orleans.)

(7) Hitchcock *v.* Galveston (1878) 96 U. S. 341; 24 L. ed. 659, held that a contract for sidewalks was valid even though the city had contracted to pay for the improvement in bonds which it had no power to issue. In an *ultra vires* contract, the city may not be forced to do anything contrary to any restrictions upon its power, but may be held liable on its contract if it receives the benefits of the contract. Bradley, Miller & Field, JJ. dissent.

(8) City of New Orleans *v.* Louisiana Construction Co. (1891) 140 U. S. 654; 35 L. ed. 556, held that city may lease wharf property for term of years without changing its character as *locus publicus* to the extent that it would become liable to seizure and sale upon execution for a debt of the corporation.

(9) Worthington *v.* City of Boston (1894) 152 U. S. 695; 38 L. ed. 603, held that city had waived advertisement for bids, and contract let without such advertisement was valid and enforceable.

(10) City of Omaha *v.* Omaha Water Co. (1910) 218 U. S. 180; 54 L. ed. 991, held that city had entered into contract to purchase waterworks and should be required to carry it out. Specific performance decreed.

(11) New Orleans Taxpayers Prot. Association *v.* Sewerage & Water board (1915) 237 U. S. 33; 59 L. ed. 828, held that city had no express or implied contract with householders to furnish them with free water for sanitary purposes.

[142] Shawnee S. & D. Co. *v.* Stearns (1911) 220 U. S. 462; 55 L. ed. 544.

[143] Farmers Loan and Trust Co. *v.* City of Galesburg (1890) 133 U. S. 156; 33 L. ed. 573.

holders of a water company which had been given a franchise by the city to furnish water of good quality to the city and its inhabitants. The grantee failed to comply with the terms of the franchise and the city in due time repudiated it. The company brought suit claiming a vested right through acceptance of the franchise. The court said:

> It seems to us that in respect to a contract of the character of the present, the ability of the company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right . . . to use the streets and to furnish water for thirty years, and when after a reasonable time they had failed to comply with the condition as to the quantity and quality of the water, the city had a right to treat the contract as terminated and to invoke the aid of a court of equity to enforce its rescission.

f. *When May a Municipality Exclude Itself from Competing With a Public Utility?*[144]

The Supreme Court considers that the grant of a right to supply a public service and to use the public streets for that purpose is the grant of a franchise ultimately vested in the state. This is true whether the grant is made directly by a state or under properly delegated authority by municipal corporations. Such grants are strictly construed in favor of the public. But inasmuch as the nature of the service furnished makes a monopoly virtually necessary, the right of municipal corporations to make exclusive grants under proper authority is recognized. Such franchises may exclude competition by another private agency or by the municipality itself or both.

A grant which excluded public competition was held to have been made in *Walla Walla v. Walla Walla Water Co.*[145] The charter of the city forbade the granting of a franchise which would exclude similar grants to others, but said nothing about contracting away the right of the city itself to compete. The court, however, held the contract valid and enjoined the city and its officers from erecting a municipal waterworks system.

Although a city may make a lawful contract for a term of years excluding even competition by itself, it may, before the expiration of the contract, make preparation for the furnishing of service through its own plant without impairing the obligation of the contract. But such preparation may not begin an unreasonable length of time before

[144] See notes 52, 53, 12 C. J. 1033.
[145] (1898) 172 U. S. 1; 43 L. ed. 341.

the contract is to expire. Thus in *Vicksburg Waterworks Co. v. Vicksburg.*[146] the court held that to prepare for the furnishing of such service after only fourteen years of a thirty-year franchise period had expired was unreasonable and should be enjoined as impairing the obligation of a contract. But when the same city began, in 1912, only four years before the franchise was to expire, to sell bonds for the construction of a municipal plant, the waterworks company again sought to restrain the action,[147] the court this time said:

> We see no reason why the city might not, if it so determined, make preparation for water supply to its own citizens whoch would be available upon the expiration of the contract. To accomplish this in the required time we think the city was within its rights.

The same question was raised by a suit in equity brought by the El Paso Water Co. against the city of El Paso to enjoin the city from establishing a waterworks system until the expiration of the franchise period.[148] The court said:

> So far as the mere construction of the waterworks is concerned, that in itself is no violation of the terms of this contract. The time for which the exclusive right, as claimed, was given is fifteen years, and the city would be guilty of no breach of obligation if during the life of the contract it proceeded to establish waterworks and put itself in condition, in the future and after the termination of the fifteen years, to supply water for public and private purposes.

Unless there is an express stipulation in the franchise contract excluding municipal competition such competition will be held to be authorized if proper charter authority exists. This is in accordance with the principle that franchise grants are to be construed strictly in favor of the public.

The city of Hamilton, Ohio, granted a gas franchise to a private corporation in 1855 for a term of twenty years. Various contracts were made for lighting the public streets for short terms. In 1889 the council passed a resolution stating that it would no longer pay for gas furnished by the company for street lighting purposes, as the contract for that purpose had expired, and provided for the issuance of bonds for the construction of a municipal gas works. The company sought an injunction against the threatened discontinuance of

[146] (1902) 185 U. S. 65; 46 L. ed. 808; 22 Sup. Ct. Rep. 585.

[147] Vicksburg *v.* Henson (1913) 231 U. S. 259; 58 L. ed. 209.

[148] El Paso Water Co. *v.* City of El Paso (1894) 152 U. S. 157; 38 L. ed. 396.

street lights and the construction of the municipal plant, alleging the impairment of the obligation of its contract.[148a]

The court, in an opinion delivered by Mr. Justice Harlan, pointed out that the statutes in force when the gas company became a corporation did not compel the city to use the gas light, and said:

> It may be that the erection and maintenance of gas works by the city at public expense, and in competition with the plaintiff will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. Every statute which affects the value of a contract does not impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants must receive the construction most favorable to the public.

Under similar facts the Supreme Court held in *Helena Water-Works Co. v. City of Helena*[149] that as the franchise ordinance contained no express stipulation that the city could not build a plant of its own, it did not exclude that right, if granted by law. There was no implied contract that the grantor would not do any act to interfere with rights conferred upon the grantee. Similarly in *Knoxville Water Co. v. Mayor*[150] the court, failing to find any words in the agreement necessarily imposing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the agreement, held that no such obligation could be implied. The court said, "No public body, charged with public duties, can be held upon mere implication or presumption to have divested itself of its powers."

A street railway in San Francisco sought to prevent the construction of a competing line by the city. Among other grounds the construction of the municipal line was opposed as impairing the obligation of a contract.[151] The court held that the sections of the code relied upon by the company as constituting a contract did not give the company the right it claimed.

[148a] Hamilton Gaslight and Coke Co. *v.* City of Hamilton (1892) 146 U. S. 258; 36 L. ed. 963; 13 Sup. Ct. Rep. 90.

[149] (1904) 195 U. S. 383; 49 L. ed. 245.

[150] (1906) 200 U. S. 22; 50 L. ed. 353.

[151] United Railroads of San Francisco *v.* City and County of San Francisco (1919) 249 U. S. 517; 63 L. ed. 739.

A somewhat different set of facts were presented in *Superior W. L. & P. Co. v. City of Superior.*[152] Here the city had granted to the company a thirty-year franchise to furnish water to the city and its inhabitants. It was provided that, if at the termination of the franchise, a renewal should be denied, the city would purchase the plant at a price fixed by a board of appraisers. When the franchise expired the city failed to make the grant, denied its obligation to purchase, and took steps to condemn the whole plant. The city maintained that the old franchise had been supplanted by an indeterminate permit granted under the general laws of the state, and that it was therefore justified in condemning under the general law.

The court pointed out that the franchise clearly was a contract. "It was beyond the competency of the legislature to substitute an indeterminate permit for rights acquired under a very clear contract." The city was, therefore, obliged to purchase the plant at a price fixed by appraisers appointed under the franchise.

Summary and Conclusions[153]

Before the adoption of the Fourteenth Amendment, the contract clause was the chief bulwark of property and business against governmental interference. It is still important, but has fallen during recent years from a position of primacy to a place secondary to the due process clause. It is significant to note that this is the only portion of Article I, Section 10, of the Constitution which has given rise to extensive litigation. In contrast with the commerce clause, which is a grant of power to the Federal Government, the contract clause is a denial of power to the states.

The contract clause cannot successfully be invoked unless there is a law under which a contract could have been formed and an obligation created; unless a contract has in fact been made; and unless there is a subsequent law of the state which impairs its obligation. The supreme court exercises its judgment independent of the state courts as to the existence of a contract, its terms, the existence of a law which could have impaired it and the fact of impairment. Any official act to which the state gives the force of law may constitute a law impairing the obligation of a contract. The decision of a state court or a resolution of a municipal council declaring an opinion cannot be termed a law.

[152] (1923) 263 U. S. 125; 68 L. ed. 204.

[153] For a general summary applying to state laws as well as municipal ordinances see Burdick, C. K., *The Law of the American Constitution*, Ch. XXII, pp. 451-474.

The state is powerless to barter away by contract with a private person or corporation the power of eminent domain. It may not thus divest itself of the police power, either, but it may for a reasonable length of time contract with public utility companies not to exercise the rate-making power. The power of taxation may never be wholly alienated, although reasonable exemptions may be granted, and these will be accorded the protection of the contract clause if they are not mere bounty arrangements.

A public officer acquires, by election or appointment, no contract right in a public office. He may, however, claim earned salary for work performed under a quasi contract.

The charter granted to a municipality by the state, and other corporate privileges accorded subsequently, do not constitute contracts within the meaning of the constitution. Such a municipality may not urge in a federal court that the state has impaired the obligation of a contract by revoking or changing a charter privilege.[154]

Franchises and other privileges conferred upon a company or individual by the state are contracts. They are also incorporeal hereditaments—a species of property. Hence the state, when necessary for the public welfare, may take such franchises for public use upon the payment of just compensation, just as it would take physical property for similar purposes.

Grants of franchises by a municipality are construed strictly against the grantee and in favor of the public. Before exclusive or perpetual rights may be given, the city's power must be clear. Then the grant must confer the monopoly or perpetuity in unmistakably clear terms. The same is true of contracts as to public utility rates. The power to fix rates is presumed to be a continuing one unless it has been clearly granted away.

Not every grant of street privileges is a franchise. It may be a mere revocable license if no term is specified or no consideration exists, or if the use is temporary and inconsistent with the public easement. In such cases a revocation of the privilege cannot impair the obligation of a contract, for no contract exists.

When a charter granted by a state confers upon a corporation authority to do business in a city, subject to the consent of the municipality,

[154] On this point see McBain, Howard Lee, "The Rights of Municipal Corporations Under the Contract Clause of the Federal Constitution," 3 *National Municipal Review* 284-303 (1914). Some state cases to the contrary are collected in an article in 6 Minn. Law Review 32.

that consent, once given, completes the contract and may not be withdrawn unless authority to withdraw was reserved in the act.

As all laws of a state in effect at the time a contract is made therein enter into and become a part of it, a general statute or constitutional provision reserving to the state the power to alter, amend, or repeal rights granted by charter, may authorize changes without impairment. But a municipality, acting under delegated authority to grant franchises, may not reserve any general power of alteration or repeal beyond ordinary control under the police power, unless such reservation is specifically authorized by law.

No contract right can be secured by an individual or corporation in a judicial decision or precedent, in a statutory mode of procedure, or in a rule established by a general police ordinance.

A street grade may be altered without impairing contract rights.

A public utility company which has entered into a contract with a municipality respecting rates is obliged to furnish service at the specified rates, even though they may be unremunerative, if the contract is mandatory as to this point. When no such contract as to rates exists, the courts hold such companies entitled to a fair return upon the property actually used in the public service, under the due process clause.

A statutory exemption from taxation, being personal in its nature, does not pass to a new owner of property upon its transfer. Neither does an exemption granted to one member of a group of consolidated companies attach to all of the others upon the consolidation. The exemption may, however, remain effective as to the portion of the plant of the consolidated company formerly owned by the recipient of the exemption privilege. Similarly, contracts as to rates of fare may not be abrogated by the annexation of territory by a city or by an extension of municipal boundaries to include new territory. All contracts of exemption from taxation are strictly construed.

When a franchise right has expired, the right of the grantee to continued use of the streets is gone and the city may require the immediate removal of its property from the streets. The city cannot, however, convert the property of the company to its own use or to the use of any third party. While the contract right is gone, the property right remains.

If a franchise is granted subject to a suspensive condition which never is fulfilled, the contract never becomes complete. Similarly, when a franchise is conferred upon condition subsequent, as to furnish service, it may be annulled by a court of equity for failure to comply with the condition.

As a general rule, a contract made under military occupation by military authority terminates with the martial law. But when the object to be attained by a contract for a term beyond the resumption of civil government is proper, and a contract of long term is necessary, one may be made which will be binding upon the succeeding civil government.

The obligation of a contract includes not only its express terms, but also all laws applicable thereto in effect at the time and place the contract is made. While remedies may be provided by law for breach of contract obligations, these remedies form no part of the contract and may affect its obligation only indirectly. Changes in remedy by a state legislative act are valid unless they materially burden the contract and affect its value. Of course, a deprivation of all remedy would be an impairment of its obligation. Denial of access to the courts has the same effect.

Thus, when bonds have been issued by a municipality in pursuance of a state statute, a law expressly denying or repealing the municipal power to levy taxes to pay the bonds would impair the obligation of the contract.

But all contracts are made subject to a reasonable exercise of the police power. Thus, railroads may be prevented from using steam engines in city streets irrespective of their franchises. They may be compelled to construct viaducts to separate dangerous grades. They may be prevented from carrying on switching operations upon a crowded street, although when the railroad was built such use was safe.

However, a city may not, under a pretended exercise of the police power, destroy a franchise contract. The police power may be used for regulatory purposes, but when an express contract has been made it may not be destroyed by municipal police legislation. Such a contract may, however, be taken upon the payment of just compensation if the public interests require it.

When a franchise contract imposes upon a street railway company the duty merely to keep the pavement between its tracks in repair, new pavement may not be charged to the company.

A public utility obtains no vested right in its charter, in the absence of specific provision, to disregard general municipal police regulations as to the laying of wires in conduits under the streets, or as to the furnishing of plans of proposed work to a municipal board for review.

A contract derived from a state constitution may not be impaired by municipal legislation, any more than one arising under a statute.

A franchise, although in it is reserved a power to alter, amend, or repeal, is not a revocable license. The reservation permits only police regulation.

A corporation may take a grant of street rights of longer duration than its franchise.

The condemnation of a franchise for a public use under the power of eminent domain does not impair its obligation as a contract. Of course, fair compensation must be given. Every contract may be considered as being made subject to an exercise of the sovereign power of eminent domain. Or the power itself may be considered as extending to all forms of property, including franchise contract rights. The power of eminent domain may in some cases be exercised against property already dedicated to public use.

It will be noted that the contract clause protects only against the passage of a law impairing the obligation of a contract. A resolution of a municipal council, or an administrative order, when not considered as a law, or an *ultra vires* ordinance, cannot impair a contract obligation. Neither is the decision of a judicial tribunal the passage of a law. A breach of contract is not an impairment, but a simple legal wrong for which an action at law for damages will normally lie—no law is passed when one party to a contract merely repudiates his obligations under a contract.

While a municipality may, under proper authority, make a contract excluding competition with a public utility even by itself, such contracts are always strictly construed against the company. A city is not restrained by an implied contract from engaging in a utility business in competition with a franchise holder. Even when it has excluded itself, a city may make preparations for undertaking a public service within a reasonable time before the expiration of the franchise in order to place itself in readiness to serve the public when the franchise does expire.

A city may not, by deducting a tax from interest payments upon its bonds, impair the obligation of an express contract to pay the interest to non-residents. Such persons are held to be outside of the municipal jurisdiction, both as to their persons and as to their property.

A franchise contract as to rates between a public utility and a municipality is effective only within the area of the city as it exists at the time the contract is made, in the absence of an express stipulation to the contrary. Attempts to force a utility to extend fare contracts to annexed territory have been held void as impairing contract obligations.

The number of cases which have been decided under the contract clause suggests that perhaps municipalities frequently feel that they have made bad bargains and seek to avoid them by passing an ordinance to alter the terms of the contract or to repeal it. The Supreme Court has shown little sympathy for these proposals, although it has construed the contracts strictly against the grantees. It is probable that the circumstances out of which these disadvantageous contracts arose is now nearly past. During the last few decades of the nineteenth century, municipal councils were at their lowest ebb. Venality and corruption were common, especially in the larger cities. Councils literally sold franchise privileges for their private gain. In smaller cities, competition for increased population and new industries, coupled with the rapid advance of mechanical inventions caused unsophisticated councils to barter away special privileges upon highly disadvantageous terms. In both cases, later councils, imbued with more altruistic motives, have tried to modify or repeal these obviously unsatisfactory conditions.

Many such contracts were granted in perpetuity. Many also conferred monopolies upon the grantees. Sometimes the power to make or change rates was contracted away. In such cases, however, the utility companies usually succeed in inducing the legislature to establish a utility commission to which they can go for rate increases.

The conclusion which should be drawn from this situation would seem to be obvious. It should be a warning to municipalities of all types and sizes never to grant utility franchises for too long a term, or without adequate sateguards for the public. As a general rule the franchises and contracts which are submitted to municipalities by utility companies are drawn carefully to protect the interests of the company, but the public interests are frequently ignored. No such franchise grant should ever be made except after the most careful scrutiny by well-qualified experts, legal and technical.

The decisions of the Supreme Court upon the contract clause seem to indicate that a municipality may never avail itself of the protection of the contract clause as against the government of the state which created it. While the point has never been squarely presented, such a conclusion seems justified for those contracts alleged to arise from proprietary or quasi-private functions equally with those arising in governmental functions.

Chapter IV

MUNICIPAL ORDINANCES UNDER THE FOURTEENTH AMENDMENT

The second sentence of the first section of the Fourteenth Amendment to the Constitution of the United States provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Under this provision many cases are brought before the Supreme Court each year in which the constitutionality of state or municipal legislation is challenged.[1]

Since 1872 more cases have been decided under the Fourteenth Amendment than under any other clause of the Constitution,[2] and practically all of these decisions have been made under the second sentence of the first section quoted above.

This sentence will be seen to consist of three parts: (1) the privileges and immunities clause, (2) the due process clause, and (3) the equal protection clause. Of these, the first probably was suggested

[1] For comments upon the Fourteenth Amendment see:

Parker, Alton B., "Due Process of Law," 37 Am. L. Rev. 641, Sept.-Oct., 1903.

Taylor, Hannis, "Due Process of Law," 41 Am. L. Rev. 354, May-June, 1907.

Taylor, Hannis, "The Growing Importance of the Fourteenth Amendment," 41 Am. L. Rev. 550, July-Aug., 1907.

Brown, T. W., "Due Process of Law," 32 Am. L. Rev., 14, Jan.-Feb., 1898.

Pipes, Martin L., "Shall Due Process of Law Be Abolished?" 58 Am. L. Rev. 290, March-April, 1924.

Bird, Francis W., Evolution of Due Process of Law," 13 Colum. L. Rev. 37, Jan., 1913.

Nesbitt, James L., "Due Process of Law and Opinion," 26 Colum. L. Rev. 23, Jan., 1926.

McQuillin, E., "Ordinances in Contravention of Common Right," 64 Cent. L. J. 209, March, 1907.

Russell, I. F., "Due Process of Law," 14 Yale L. J. 322, April, 1905.

Cushman, R. E., "The Social and Economic Interpretation of the Fourteenth Amendment," 20 Mich. L. R. 737, May, 1922.

Rose, Arthur P., "Due Process of Law," 10 Const. Rev. 81, April, 1926.

Hill, Thos. B., Jr., "The Federal Constitution and the Fourteenth Amendment," 1 Ala. L. J. 68, Feb., 1926.

Hough, Chas. M., "Due Process of Law—Today," 32 Harv. L. R. 218, Jan., 1919.

[2] For a chonological table of cases decided by the Supreme Court under the Fourteenth Amendment 1872-1910, see Collins, C. W., *The Fourteenth Amendment and the States*, Boston, 1912.

by the first sentence of Article IV, Section 2 of the Constitution which provided that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

To make certain that there would be no question as to who was a citizen of the United States, it was provided in the first sentence of section one of the Fourteenth Amendment that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[3] This sentence brought to a close a controversy which had its beginnings in the early days of the United States as to whether national citizenship was primary or secondary by establishing a rule that left no room for doubt as to the primary character of the federal citizenship.

The Supreme Court has never undertaken to catalogue the privileges and immunities of citizens of the United States as distinguished from those of citizens of a state. As cases have arisen from time to time the court has added or refused to add certain rights to a growing list of the privileges and immunities of federal citizenship. The court did make it clear, however, in the Slaughter House Cases,[4] that the privileges and immunities of federal citizens were different from those of state citizens.

The principal purpose of the "privileges and immunities" clause was to throw about the negro, who was made a citizen of the United States by the amendment, all of the protection against hostile state action which he enjoyed against federal action through the guarantees of the federal bill of rights.[5] In this, the framers of the amendment were unsuccessful. The Supreme Court, when squarely confronted by this problem, refused to lend its sanction to the attempt to transfer the protection of the civil rights of individuals against state action from the state to the federal courts. Even in the face of public records as to the intention of the framers of the amendment to effectuate such a purpose, the court, in the Slaughter House Cases said, "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them." In *Maxwell v. Dow*[6] the Supreme Court specifically

[3] The principal immediate purpose of this provision was to overcome the effect of the Dred Scott decision in which the Supreme Court had held that no man of African descent could be a citizen of a state or of the United States.

[4] (1873) 16 Wall. 36; 21 L. ed. 394.

[5] Flack, Horace E., *The Adoption of the Fourteenth Amendment*, Baltimore, 1908.

[6] (1900) 176 U. S. 581; 44 L. ed. 597.

decided that the "privileges and immunities of citizens of the United States," as intended by the amendment, did not include the rights contained in the first eight amendments to the constitution.

According to some scholars, the due process clause had its origin in the early English law. It appears, in substance, as "the law of the land" in Magna Carta.[7]

The Fifth Amendment to the Federal Constitution provided that "no person . . . (shall be) deprived of life, liberty, or property without due process of law." During the early years of the republic attempts were made to have this article construed as a limitation upon the action of the states as well as of the Federal Government. But the Supreme Court pointed out that a similar guarantee appeared in the state constitutions, and that in any event the first eight amendments were intended as a restriction only upon the action of the Federal Government.[8]

The framers of the Fourteenth Amendment having these decisions of the Supreme Court in mind, and with full knowledge of the provisions of the bills of rights of the various state constitutions, sought by their proposal to take final jurisdiction of all due process cases from the states and confer it upon the federal courts. It was thought that by this expedient negroes who might be denied a fair trial in the courts of their states could bring their cases into the federal courts for impartial determination. But in addition to serving as a bulwark of safety for the harassed negro of the South, the clause has also served as the protector of the rights of private property. Corporations were held to be "persons" within the meaning of the amendment, and they have been quick to resort to its protection where corporate property has been affected by state or municipal action.

This clause has probably undergone the widest development of any of those which were included in the Fourteenth Amendment. From the statement in the Slaughter House Cases that the due process clause was not a restraint upon the police power of the state, to cases holding state and local legislation unconstitutional because of unreasonableness or discrimination in its enforcement is a far cry. Yet it must be said for the court that, although the mass of due process litigation is constantly increasing, the court is very conservative in declaring state and municipal acts invalid. Unless the enactment brought into question

[7] See Brannon, Henry, *Treatise on . . . Fourteenth Amendment*, Cincinnati, 1901, pp. 1-15.

[8] Barron *v.* Baltimore (1833) 7 Pet. 243; 8 L. ed. 672.

is clearly unreasonable, arbitrary, or discriminatory, the court will not hold it void.

The equal protection clause seems to have had no constitutional precedent. It was avowedly inserted to protect negro rights in the states against discrimination in legislation by the state or by its municipalities. In the Slaughter House Cases, Mr. Justice Miller said, "We doubt very much whether any action of a state not directed by way of discrimination toward negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

The experience of sixty years, however, has shown little support for this prophecy. C. W. Collins in his volume on *The Fourteenth Amendment and the States*[9] shows statistically that, of the 604 cases decided under the Fourteenth Amendment between 1868 and 1910, only twenty-eight involved any member of the negro race or the rights of negroes. In practice, the equal protection clause is rarely resorted to aside from the due process clause. Both are frequently cited in cases in which the Fourteenth Amendment is relied upon.

In the same table by Collins he shows that in forty of the 604 cases mentioned above, the privilege and immunity clause was involved; in 273, the equal protection clause; and in 575, the due process clause. Of the due process cases, twenty-four involve deprivation of life; 128, deprivation of liberty; and 423, deprivation of property. In 302 cases the sphere of state activity involved is the police power; in twenty-seven cases, the power of eminent domain; in 144, the power of taxation; while in 146 cases procedural points were raised. Cases under the Fourteenth Amendment arose in state courts initially in 497 cases, while original federal jurisdiction accounts for 107. Decision was in favor of the state in 549 cases, while in only fifty-five cases the decision was against the state. Dissents were recorded in 155 of the cases.

These figures tend to show, for the period studied, that most of the cases under the Fourteenth Amendment were brought by persons not of the negro race to avoid some state police power legislation. These cases originally appear in the state courts, and upon appeal they are usually decided in favor of the state. More of them involve a deprivation of property without due process of law than any other question under the Fourteenth Amendment.

One of the chief reasons for the multiplicity of due process cases is the broad policy of the court in taking jurisdiction where a violation

[9] *Op. cit.* p. 183.

of the Fourteenth Amendment is averred. In this respect, the contract clause probably established the precedent. We have seen that the court will exercise an independent judgment upon many questions under the contract clause. If anything, the tendency to follow a similar course under the due process clause is even a little stronger.

In the case of *Home Telephone & Telegraph Co. v. City of Los Angeles*,[10] the city sought to challenge the jurisdiction of the federal courts upon the ground that an identical suit was pending in the state courts and that until the state supreme court declared that the ordinance in controversy was within the power of the city to pass, no case could arise under the Fourteenth Amendment. The court, however, pointed out that a *prima facie* case of violation of the amendment was made out in the bill, and that it could exercise its independent judgment as to the validity of the ordinance so long as the state courts had not acted. The results of the rule contended for by the city were pointed out by the court as follows:

> If it were adhered to, the federal courts in any form of procedure or in any stage of a controversy would have to await the determination of a state court before taking jurisdiction, and the doctrine would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States, in all cases covered by the Fourteenth Amendment. The immediate and efficient federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment.

On the other hand the Supreme Court has sometimes refused to take jurisdiction of cases under the Fourteenth Amendment where no substantial federal question has been found to exist.[11] On one occasion, a waterworks company sought to use the amendment to secure an injunction against an alleged illegal diversion of municipal funds. Obviously such a complaint could give rise to no federal question for even though such acts might be *ultra vires*, they could be legalized by the legislature. The court remarked:

[10] (1913) 227 U. S. 278; 57 L. ed. 510. Since the enactment of the Judiciary Act. of 1914, the Supreme Court may take jurisdiction on error of all cases involving federal constitutional questions whenever the decision of the state court is in favor of the validity of the law in question; it may also take jurisdiction on *certiorari* of similar cases whenever the decision of the state court is against the validity of the law.—Judicial Code, sec. 237.

[11] See Zucht *v.* King (1922) 260 U. S. 174; 67 L. ed. 194.

> The Fourteenth Amendment was not intended to bring within federal control everything done by the state or its instrumentalities which are simply illegal under the state laws, but only such acts as are violative of rights secured by the Constitution of the United States.[12]

The Fourteenth Amendment is broader than the contract clause in that under the latter only the passage of a law could produce a violation, while under the former any state action suffices.[13] But a breach of contract does not deprive any one of property without due process of law any more than it can impair the obligation of a contract.[14]

In a proceeding under the city charter of Lincoln, Nebraska, for the removal of a police judge, the latter objected on the ground that the procedure used deprived him of his rights without due process of law. The "rights" which he specifically claimed were to have process to compel attendance of witnesses in his behalf and trial by jury. It was pointed out by the court that these guarantees in the federal bill of rights were effective only against federal action and that they were not the measure of the content of the due process guaranteed by the Fourteenth Amendment. The case was consequently held to be one of exclusive state cognizance.[15]

Similarly in *Southern Ry. v. City of Durham*[16] the railway company complained that it was deprived of property without due process of law by a denial of a right to a jury trial in a state court. The Supreme Court was unable to find that the company had been deprived of any right guaranteed by the Federal Constitution.

On the contrary, however, a trial of a violator of a state prohibitory law before a judge who is paid by fees derived from fines has been held void as a denial of due process.[17] The interest of the magistrate in the outcome of the trial was held to be sufficient to influence him adversely to the defendant.

[12] Owensboro Waterworks Co. *v.* City of Owensboro (1906) 200 U. S. 38; 50 L. ed. 361.

[13] Burdick, C. K., *The Law of the American Constitution*, p. 503. Ex parte Virginia (1880) 100 U. S. 313, 347. 25 L. ed. 667. See Memphis *v.* Cumberland Tel. and Tel. Co. (1910) 218 U. S. 624; 54 L. ed. 1185 for a suggestion of a contrary view.

[14] Shawnee S. & D. Co. *v.* Stearns (1911) 220 U. S. 462; 55 L. ed. 544. McCormick *v.* Oklahoma City (1915) 236 U. S. 657; 35 S. C. R. 455, 59 L. ed. 771.

[15] Ex parte Sawyer (1888) 124 U. S. 200; 31 L. ed. 402.

[16] (1924) 266 U. S. 178; 45 Sup. Ct. Rep. 51. 69 L. ed. 231.

[17] Tumey *v.* State of Ohio (1927) 273 U. S. 510; 47 Sup. Ct. Rep. 437. 71 L. ed. 749.

For a case contra presenting slightly different facts see Dugan *v.* Ohio (1928) 277 U. S. 61; 48 Sup. Ct. Rep. 439; 72 L. ed. 784.

1. The Fourteenth Amendment and the Police Power[18]

a. *Public Morals*[19]

Under an ordinance of the city and county of San Francisco persons who wished to carry on the business of selling liquor were required to obtain the written consent of a majority of the Board of Police Commissioners or a written recommendation of not less than twelve citizens owning real estate in the block where the business was to be carried on. A dealer who had been licensed for some years was denied the necessary recommendation and was refused a license. He was arrested and convicted of carrying on his business without a license, and he defended on the ground that the ordinance was void under the Fourteenth Amendment.[20] The police commissioners justified their action in refusing him a license but the lower court held that the ordinance made the business of the petitioner dependent upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws. The Supreme Court, however, reversed this decision. Mr. Justice Field, who delivered the opinion of the court, said:

> It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business under such restrictions as are imposed upon persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. The sale of liquor in small quantities may be absolutely prohibited. As it is a business of danger to the community it may be entirely prohibited or be permitted under such conditions as will limit its evils.

In *Cronin v. Adams*[21] an injunction was sought against the enforcement of an ordinance of the city of Denver which excluded females from saloons on the ground that it was contrary to the Fourteenth Amendment. Mr. Justice McKenna, who delivered the opinion of the Court, said:

> What cause of action has the plaintiff in error? He is not a female nor delegated to champion any grievance females may have under the ordinance. The right to sell liquor by retail to any one depends upon the

[18] See Burdick, C. K., *op. cit.*, Chapter XXXII, pp. 559-585.

[19] For cases as to constitutionality of morals legislation see 12 C. J. 918.

[20] Crowley *v.* Christensen (1890) 137 U. S. 86; 34 L. ed. 620.

[21] (1904) 192 U. S. 108; 48 L. ed. 365.

laws of the state, and they have affixed to that right the condition expressed in the ordinance. But even if plaintiff in error were not in such situation he could not resist the ordinance. The regulation of the sales of liquor is a question of public expediency and public morality, and not of federal law.

Since the decision of these two cases, the sale of intoxicating liquor has, of course, become a matter of federal as well as state cognizance. The adoption of the Eighteenth Amendment, with its provision for state and federal cooperation in enforcement has raised new questions which are still in the process of solution. Since the Volstead Act, only one case has arisen under the Fourteenth Amendment which involved a municipal liquor ordinance.

The city of Los Angeles had, under proper authority, enacted an ordinance forbidding the filling of a prescription for more than eight ounces of intoxicating liquor. A licensed pharmacist who was arrested for a violation of the ordinance averred that it was in contravention of his rights under the Fourteenth and Eighteenth Amendments, and was contrary to the Volstead law.[21a]

The case was dismissed by the Supreme Court because of the failure to raise a substantial federal question. The court said, however, that neither the Eighteenth Amendment nor the Volstead Act granted the right to sell intoxicating liquor within a state, and that certainly nothing in the act lent color to the suggestion that it endowed a pharmacist with a right to dispense liquors, for which he might claim the protection of the Fourteenth Amendment.

In *Gundling v. City of Chicago*[22] a cigarette dealer who had been convicted of violating a city ordinance requiring such persons to secure a license attacked the ordinance on the grounds that uncontrolled discretion had been delegated to the mayor in the granting and revoking of licenses and that the license fee of $100 per year was so unreasonably high as to deprive him of property without due process. His principal objection to the amount of the license fee was that it greatly exceeded the cost of regulating his business.

It was somewhat doubtful whether the plaintiff in error was in a position to raise the question of the invalidity of the ordinance simply because of the alleged arbitrary power of the mayor to grant or refuse a license. He made no application and, of course, the mayor had not refused it. But, waiving this matter, the court held that:

[21a] Hixson *v.* Oakes (1923) 265 U. S. 254; 68 L. ed. 10005; 44 Sup. Ct. Rep. 514.
[22] (1900) 177 U. S. 183; 44 L. ed. 725.

> The ordinance in question did not grant to the mayor arbitrary power such as is prescribed in the laundry case.[22a] The license is to be issued by the mayor if satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes . . . The mayor is bound to grant a license to every person fulfilling these conditions. There is no proof or charge in the record that there has been any discrimination against persons applying for a license, or any abuse of discretion on the part of the mayor.
>
> Whether dealing in and selling cigarettes is the kind of a business which ought to be licensed is, we think, considering the character of the thing to be sold, a question for the state, and, through it, for the city to determine for itself, and that an ordinance prescribing reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.
>
> The amount of the fee is fixed by the council, and the text of the ordinance and the amount of the fee would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. . . . It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax, and the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills two functions, one a regulating and the other a revenue function.

The city and county of San Francisco passed an ordinance making it unlawful to exhibit gambling implements in a barred or barricaded house or room, or to visit such a place where gambling implements were exposed to view. Ah Sin, a Chinese, was arrested for a violation of this ordinance and applied for a writ of habeas corpus alleging that the ordinance although general in form was enforced in a discriminatory manner against persons of the Chinese race. Upon hearing, the writ was discharged and the prisoner remanded. He secured a writ of error to the Supreme Court.[23]

The court held that the suppression of gambling was concededly within the police power of the state, and that legislation to that end would not be interfered with by the federal courts unless it clearly and unmistakably infringed rights guaranteed by the Constitution. The allegation of discrimination was held not to be supported by the evidence, so the ordinance was upheld.

One other case involves an ordinance for the protection of public morals. The city of South Pasadena, in pursuance of its police power, passed an ordinance which prohibited the keeping of billiard or pool

[22a] See infra., p. 136.

[23] Ah Sin *v.* Wittman (1905) 198 U. S. 500; 49 L. ed. 1142.

tables for public use, excepting those kept at hotels for the exclusive use of their guests. A man named Murphy was convicted of a violation of the ordinance and appealed on the ground that the ordinance deprived him of rights under the Fourteenth Amendment.[24] He testified in the lower court that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipment, that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted; and that there was nothing in the conduct of the business which had any tendency to immorality, or could in the least affect the health, comfort, safety, or morality of the community, or those who frequented his place of business. This evidence was excluded. He appealed, claiming that the ordinance, in preventing him from maintaining a billiard hall, deprived him of the right to follow an occupation which was not a nuisance *per se*, and which therefore could not be absolutely prohibited. The court supported the ordinance, saying:

> The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which because of their nature or location, may prove injurious or offensive to the public.
>
> But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted. Playing at billiards is a lawful amusement, and keeping a billiard hall is not a nuisance *per se*. That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof. The fact that there had been no disorder or open violations of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation.
>
> Under the laws of the state, South Pasadena was authorized to pass the ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain for the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

[24] Murphy *v.* People (1912) 225 U. S. 623; 56 L. ed. 1229.

b. Public Peace and Safety: Prevention of Fraud[25]

An ordinance of the city of Boston forbade the making of public addresses upon Boston Common unless a permit was obtained from the mayor. A preacher named Davis was arrested and convicted of a violation of this ordinance. He complained that the ordinance was an infringement of his rights under the Fourteenth Amendment. His contention rested upon the assumption that he had a right to use the Common free from municipal control. He argued that the Common was the property of the inhabitants of the city, and was dedicated to their use, and that preaching there had been from time immemorial one of those uses.[26] The court said:

> The Fourteenth Amendment to the Constitution does not destroy the power of the states to enact police regulations as to the subjects within their control, and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state.

In *Lehon v. City of Atlanta*,[27] a city ordinance requiring that any person carrying on the business of a private detective should be subject to police supervision, and should take an oath and give a bond was attacked by a man who had been convicted of violating the ordinance on the ground that he was thereby deprived of his rights under the Fourteenth Amendment. He claimed that the effect of requiring the consent of the board of police commissioners was to abolish the occupation of private detective in which he asserted a lawful right to engage. The court, however, held that the ordinance was easily within the principle of the police power.

In *Yates v. Milwaukee*[28] the city sought through its power to regulate matters affecting navigation within its harbor, to establish a wharf line, and to declare all wharves and structures extending beyond that line to be nuisances. Yates, a riparian proprietor, who owned a wharf extending beyond the established line, brought action to restrain the city from interfering with his wharf. He claimed that the city ordinance was arbitrary and unreasonable in the limits which it established. The court was inclined to agree with the complainant. His rights as a

[25] For citations to cases as to constitutionality of legislation for promotion of public safety and the prevention of fraud, see 12 C. J. 916, 920.

[26] Davis *v.* Commonwealth (1897) 167 U. S. 43; 42 L. ed. 71. See also Peo. ex rel. Doyle *v.* Atwell (1923) 261 U. S. 590; 67 L. ed. 814.

[27] (1916) 242 U. S. 53; 61 L. ed. 145.

[28] (1871) 10 Wall. 497; 19 L. ed. 984.

riparian owner were declared to be valuable and of such a nature that he could not properly be deprived of them without compensation. As to the ordinance, the court said:

> The city has been given power to establish dock and wharf lines and to restrain and prevent encroachments on the river. But the mere declaration of the council that this structure was a nuisance did not make it so, nor could such declaration make a nuisance unless it in fact had that character.
>
> It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws of either the city or state, within which a certain structure can be shown to be a nuisance, can by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities.

Public safety may be promoted by regulations respecting the temporary use of the streets and sidewalks for purposes inconsistent with their use for traffic and communication. One type of use which has been so regulated is that of house moving.

In *Wilson v. Eureka City*[29] a city ordinance requiring that no person should move any building into or upon any street without the written permission of the mayor was upheld. Wilson had been convicted of violating the ordinance and had appealed, alleging that his rights under the Fourteenth Amendment had been infringed. The delegation of authority to the mayor was objected to, as well as the unrestrained discretion which the ordinance reposed in him. The court held, however, on authority of *Davis v. Commonwealth (supra)* that no right had been infringed.

The establishing of reasonable regulations to prevent fires and explosions is recognized as a legitimate field of police power activity. The city of Hope, Arkansas, had enacted an ordinance prohibiting the storage of petroleum, gasoline, and other inflammable and explosive liquids within 300 feet of any dwelling, beyond certain specified small quantities. A company engaged in the business of selling such products sought to enjoin the enforcement of the ordinance.[30] Mr. Justice Holmes, who delivered the opinion of the court, upheld the ordinance in all its particulars. He said:

> A state may prohibit the sale of dangerous oils . . . and it may make the place where they are kept or stored a criminal nuisance notwith-

[29] (1899) 173 U. S. 32; 43 L. ed. 603.

[30] Pierce Oil Corporation *v.* City of Hope (1919) 248 U. S. 498; 63 L. ed. 381.

standing the Fourteenth Amendment. The power is a continuing one and a business lawful today may in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. As to the allegations that the plaintiff's plant is safe and does not threaten the damage that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted. As the court below said, we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have been offered. Indeed, the answer admits some possible combustion, but undertakes to limit its possible effects. If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp. The fact that the removal to the present situation was made at the city's request does not import a contract not to legislate if the public welfare should require it, and such a contract, if made, would have no effect.

In *Maguire v. Reardon*[31] an ordinance of the city and county of San Francisco prohibiting the construction of wooden buildings within certain fire limits fixed in the ordinance was about to be applied in the tearing down of a structure which had been unlawfully erected. The owner of the building brought action for an injunction. The court held, however, that the ordinance must be treated as affecting an unlawful structure and, as so applied, it could find no plausible ground for holding it in conflict with the Federal Constitution.

In 1884, the board of supervisors of the city and county of San Francisco passed an ordinance making it unlawful to carry on the business of a public laundry within certain limits without first having obtained a certificate signed by the health officer and a further certificate from the board of fire wardens. One section of the ordinance prohibited the washing or ironing of clothes between the hours of 10 P. M. and 6 A. M. or on Sunday. In a proceeding for the enforcement of the ordinance it was alleged by the defendant that it violated the Fourteenth Amendment in that it was discriminatory and unreasonable.[32] The Supreme Court, in its opinion, said in part:

> The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belong to such bodies, and it would be an extraordinary usurpation of the authority of a municipality if a federal tribunal should undertake to supervise such regulations.
>
> The Fourteenth Amendment, broad and comprehensive as it is, was not designed to interfere with the power of the state, sometimes termed

[31] (1921) 255 U. S. 271; 65 L. ed. 625.

[32] Barbier *v.* Connolly (1885) 113 U. S. 27; 28 L. ed. 923.

its police power. In the case before us the provisions requiring certificates from the health officers and the board of fire wardens may in some instances be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome. But this is a matter for the determination of the municipality in the execution of its police powers, and is not a violation of any substantial right of the individual.

The same regulation was before the Supreme Court again in *Soon Hing v. Crowley*[33] and the claim was made that the ordinance made an unwarranted discrimination against the laundry business, in that it was the only one which was required to cease from its labors at the prescribed hours. The Supreme Court pointed out that there might be no such risk attending the business of others and that there was, therefore, a valid basis for classification. The contention also was made that the ordinance deprived one of the right to work at all times. This right, the court pointed out, was a qualified one, subject to such general rules as are adopted by society for the common welfare.

The principal objection to the ordinance, however, was that it had been adopted owing to the feeling of antipathy and hatred prevailing against Chinese. The court, however, failed to find anything in the language of the ordinance to sustain this allegation. It pointed out that as a rule the courts will not inquire into the motives of a legislative body in passing a regulation, and that in the present instance, even if the motives had been as alleged, the ordinance would not have been thereby changed from a legitimate police regulation, unless in its enforcement it was made to operate against a class. There was no allegation of this.

It was not long, however, before such a discriminatory enforcement was brought to the attention of the Supreme Court in *Yick Wo v. Hopkins*.[34] In this case, it was brought out that the ordinance which was examined in *Barbier v. Connolly (supra)* had been amended so as to require the operator of a laundry to secure not only the certificates of the health officer and the board of fire wardens, but also the consent of the board of supervisors. The petitioner had secured the certificates but had been refused permission from the board of supervisors to carry on his business. It was alleged that this refusal was a deprivation of liberty and property without due process of law. It was shown by the testimony that the board of supervisors had used the power conferred by the ordinance principally to deny licenses to subjects of the Emperor of

[33] (1885) 113 U. S. 703; 28 L. ed. 1145.
[34] (1886) 118 U. S. 356; 30 L. ed. 220.

China. Mr. Justice Matthews, who delivered the opinion of the court, said:

> The court (below) considered those ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding assent to the use of wooden buildings as laundries. But . . . they seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.
>
> Though the law itself be fair upon its face and impartial in appearance, yet if it is applied and administered by public authority with an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution. The present cases are within this class. The fact of this discrimination is admitted. No reason for it is shown, and no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution.

An ordinance of the city of Chicago fixing the size of loaves of bread was attacked as a deprivation of property without due process in an action by the city against a baker for violation of its provisions.[35] Schmidinger, the baker, alleged that the provisions of the ordinance were arbitrary and unreasonable. He claimed that trade practice had led to the use of price as the determining factor in the size of loaves of bread. The weight was adjusted in accordance with fluctuations in the price of raw material, labor, and other elements of expense of production, the different qualities of bread, and as a result of competition. Mr. Justice Day, who delivered the opinion of the court, said:

> Laws and ordinances of the character of the one here under consideration, and tending to prevent frauds, and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power. The local legislature is presumed to know what will be of the most benefit to the whole body of citizens. Evidently the council of the city of Chicago has acted with the belief that a full pound loaf, with the variations provided, would furnish the best standard. It has not fixed the price at which bread may be sold. It has only prescribed that the standard weight must be found in the loaves of the sizes authorized.

[35] Schmidinger *v.* City of Chicago (1913) 226 U. S. 578; 57 L. ed. 364. For comment see 2 National Municipal Review 527 (1913).

> We cannot say that the fixing of these standards in the exercise of the legislative discretion of the council is such an unreasonable and arbitrary exercise of the police power as to bring the case within the rare class in which this court may declare such legislation void because of the provisions of the Fourteenth Amendment to the Constitution, securing due process of law from deprivation by state enactments.
>
> It is further urged that the ordinance interferes with the freedom of contract guaranteed by the Fourteenth Amendment, for it is said there is a demand for loaves of bread of sizes other than those fixed in the ordinance. . . . So long as such action has a reasonable relation to the exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a deprivation of due process of law, freedom of contract is not interfered with in a constitutional sense.

c. *Public Health*[36]

Ordinances for the protection of the public health although frequently attacked under the Fourteenth Amendment have been uniformly upheld. An ordinance of the city of Des Moines, Iowa, prohibited the emission of dense smoke in certain portions of the city. A laundry company sought to enjoin the enforcement of the ordinance on the ground that it was arbitrary, unreasonable and discriminatory in its requirements.[37] The court, however, failed to agree with the contentions of the company, and upheld the ordinance.

In *Laurel Hill Cemetery v. City and County of San Francisco*[38] the Supreme Court upheld an ordinance prohibiting the burial of the dead within the city and county limits. A cemetery company owning land formerly used for burial purposes within the prescribed limits sought to enjoin the enforcement of the ordinance, claiming that it would deprive them of their property without due process of law. The court was urged to take judicial notice of the opinions of scientific men who have maintained that cemeteries are in no way harmful, and upon the strength of that to declare the ordinance void as having been founded on a mistaken view. The court, however, refused to follow this course, saying that there might well have been other reasons for the adoption of the ordinance. Mr. Justice Holmes concludes the opinion with the following statement:

> Questions of this kind demand great caution in overruling the decision of the local authorities or in allowing it to be overruled. . . . The

[36] For citations to cases on constitutionality of health regulations, see 12 C. J. 913.

[37] Northwestern Laundry *v.* City of Des Moines (1916) 239 U. S. 486; 60 L. ed. 396. See also 12 C. J. 1267 and 28 Cyc. 717. Moses *v.* U. S. (1900) 16 App. 428; 50 L. R. A. 532.

[38] (1910) 216 U. S. 358; 54 L. ed. 515.

> plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the courts of his own state uphold.

Ordinances of the city of San Antonio, Texas, provided that no child should attend a public school without first presenting a certificate of vaccination. Acting under these ordinances, school officials excluded a girl from public school because she did not have the required certificate and refused to submit to vaccination. Suit was brought against the officers for damages and for an injunction against their further interference with her school attendance. The bill charged that there was then no occasion for vaccination; that the ordinancec were a deprivation of liberty without due process of law, because vaccination was made compulsory; and that arbitrary power was vested in the enforcing officers.[39]

Mr. Justice Brandeis, who delivered the opinion of the court pointed out that long before this suit was instituted it had been settled in the Supreme Court that a state had power to compel vaccination.[40] It was also settled law that a state might constitutionally delegate to a municipality authority to determine under what conditions health regulations should become operative. Other cases had settled that a municipality might vest in its officers broad discretion in matters affecting the application and enforcement of a health law. In view of this state of the law the case was dismissed as presenting no question sufficiently substantial to support the writ of error.

The city of Valdosta, Georgia, provided by ordinance that all property owners residing upon any street in which a sewer main had been laid, should, within thirty days after the passage of the ordinance, install water closets in their houses. These were to be connected with the sewer main and provided with water so that they might be ready for use in the ordinary and usual way. Such persons were forbidden thereafter to use or keep on their premices a surface closet or privy. A house without a water closet was declared a nuisance and the owner was subject to a fine. A property owner refused to comply with the ordinance and brought action to restrain its enforcement on the ground that it was a deprivation of property without due process of law.[41]

[39] Zucht *v.* King (1922) 260 U. S. 174; 67 L. ed. 194. See also 12 C. J. 1267.

[40] Jacobson *v.* Commonwealth (1905) 197 U. S. 11; 49 L. ed. 643; 25 S. C. R. 358, 3 Ann. Cas. 765.

[41] Hutchinson *v.* City of Valdosta (1913) 227 U. S. 303; 57 L. ed. 520. See also 12 C. J. 1267.

The Supreme Court was not disposed to give much weight to the petitioner's contentions. It was pointed out that the city was properly empowered to pass the ordinance and that the state courts had held that the ordinance was within this power. The court continues:

> It is the commonest exercise of the police power of the state or city to provide for a system of sewers and to compel property owners to connect therewith. . . . It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good, or that such was not its effect.

In a recent case from Galveston, Texas, an osteopathic physician complained of a regulation of the city hospital board which excluded from practice in the city hospital all osteopathic physicians, alleging that this rule was a deprivation of his liberty without due process of law.[42] Mr. Justice Stone, who delivered the opinion of the court, said:

> We fail to perceive any substantial basis for asserting that rights guaranteed to (plaintiff) by the Fourteenth Amendment have been infringed. . . . It cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or political subdivision. . . . It is not incumbent upon the state to maintain a hospital for the private practice of medicine. But it is argued that if some physicians are admitted to practice in the hospital, all must be, or there is a denial of the equal protection of the laws. Even assuming that the arbitrary exclusion of some physicians would have that legal consequence, in the circumstances of this case, the selection complained of was based upon a classification not arbitrary or unreasonable on its face.

The municipal code of Chicago provided that food which was found by the inspectors to be unfit for human consumption should be summarily destroyed. Acting under this provision, representatives of the city demanded the immediate delivery of forty-seven barrels of poultry from a cold storage warehouse for destruction, under the allegation that they were decayed and unfit for food. The warehouse, as bailee for hire, refused to deliver the poultry, whereupon the city threatened to and did prevent the further delivery of goods to or from the warehouse. The company thereupon applied for an injunction to prevent the seizure of the poultry and further interference with the business. In its bill, the

[42] Hayman *v.* City of Galveston (1927) 273 U. S. 414; 47 Sup. Ct. Rep. 363. 71 L. ed. 714.

company alleged that the attempt to seize, condemn, and destroy the poultry without a judicial determination of the fact that it was unfit for human food was illegal. The lower court restrained the interference with the business but held that the ordinance was valid and that the demand of the officers for the delivery of the poultry was lawful.[43] The Supreme Court, speaking through Mr. Justice Peckham, said:

> We are of the opinion that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. Food in such condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a condition which concludes the owner. The *ex parte* findings of the health officers as to the fact are not in any way binding upon those who own or claim the right to sell the food. If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find that the food was unwholesome as claimed by them.
>
> As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied to the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The small value that might remain in said food is a mere incident, and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food.

Ordinances regulating the sale of milk in a city have been upheld by the United States Supreme Court on two occasions against contentions of denial of due process. The first case is *N. Y. ex rel. Liebermann v. Van de Carr*.[44] Here the sanitary code of the city of New York provided that no person should sell milk in the city without a permit from the board of health. Liebermann had such a permit but it had been revoked and he was later arrested for selling milk without a permit. He applied for a writ of habeas corpus alleging that the ordinance delegated arbitrary power to the board of health in granting and refusing

[43] North Amer. Cold Stor. Co. *v.* Chicago (1908) 211 U. S. 306; 29 S. C. R. 101; 53 L. ed. 195; 15. Ann. Cas. 276.

[44] (1905) 199 U. S. 552; 50 L. ed. 305. See also 12 C. J. 1251 and Walker, Harvey, *Regulating the Production, Handling, and Distribution of Milk*, Public Health Reports, Aug. 10, 1928.

licenses and that in singling out the milk business for regulation he was denied the equal protection of the laws. Mr. Justice Day, who delivered the opinion of the court, said:

> This court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of the people. . . . There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against any individual, this court has not hesitated to interfere for his protection. . .
>
> Nor do we think there is force in the contention that the plaintiff in error was denied the equal protection of the laws because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code. It is primarily for the state to select the kinds of business which shall be the subject of such legislation; it is no valid objection that similar regulations are not imposed upon other businesses of a different kind.

The second case arose out of an ordinance of the city of Milwaukee requiring tuberculin tests for all cattle producing milk for sale in the city, and providing for the destruction of milk brought into the city if not produced in accordance with the requirements of the ordinance. A suit was brought to restrain the enforcement of the ordinance on the ground of its repugnance to the Fourteenth Amendment.[45] The tuberculin test was characterized as wholly unreliable, untrustworthy, and entirely worthless. The milk threatened to be confiscated was described as pure and wholesome. Further objection was made to differences in regulation between cows kept in the city and those kept outside. The opinion, which was delivered by Mr. Justice McKenna, pointed out the fallacy of these contentions. The court said:

> If we regard the territorial distinction merely, there is certainly no discrimination. . . . Cows kept outside of the city cannot be inspected by health officers. They can be inspected by a licensed veterinary surgeon, and a certificate of the fact and the identity of the cows and the milk authenticated as required by the ordinance. The requirements are not unreasonable; they are properly adapted to the conditions. They are not discriminatory; they have proper relation to the purpose to be accomplished.
>
> The plaintiff further contends that the ordinance, which requires milk that does not conform to its requirements to be confiscated and destroyed, takes his property without due process of law. To sustain his

[45] Adams *v.* City of Milwaukee (1913) 228 U. S. 572; 57 L. ed. 971.

contention, he assumes the purity of his milk, although it has not been tuberculin tested. But the plaintiff overlooks the allegation of his complaint. His allegation is not that his cows are free from infectious or contagious disease, but only so far as he is able to learn or discover. And the allegation of his willingness to withdraw tainted milk from sale depends upon the same contingent knowledge or information. He overlooks also the findings of the courts against the sufficiency of his information, and their demonstration of the necessity of the tests established by the ordinance. But even if the necessity of the tests be not demonstrated and the beliefs which induced them may be disputed, they cannot be pronounced illegal. The ordinance is not an arbitrary and unreasonable deprivation of property in a wholesome food, but a regulation having the purpose of and found to be necessary for the protection of the public health. The police power of the state must be declared adequate to such a desired purpose. Criminal pains and penalties would not prevent the milk from going into consumption. To stop it at the boundaries of the city would be its practical destruction. To hold it there to await judicial proceedings would be impracticable. We agree with the court that the destruction of the milk was the only available and efficient penalty for the violation of the ordinance.

In two cases decided in 1905, the Supreme Court considered and upheld municipal regulations respecting the collection and disposal of garbage.[46] The first of these involved an ordinance of the city and county of San Francisco. The supervisors had granted an exclusive franchise for the collection and destruction of garbage.

Suit was brought by the holder of this franchise against another company to enjoin the removal of garbage by them to a point outside the city and county, thereby preventing its delivery to and incineration by the franchise holder and reducing its income and profits.[47] The defendant attacked the power of the board of supervisors to pass the ordinances, but this was upheld by the court as implied from its power to make sanitary regulations and to protect the public health. He further insisted that the ordinances were violative of the Fourteenth Amendment in that they deprived the householders of San Francisco of property of value, by transferring it to the Sanitary Reduction Works without requiring compensation to be made. In answer to this contention, the court said:

The defendants insist that the requirement that the substances mentioned should be delivered to the plaintiff's works for cremation, at the expense of the person conveying the same, is a taking of private property

[46] See 12 C. J. 1267; 28 Cyc. 717.

[47] California Reduction Co. *v.* Sanitary Reduction Works (1905) 199 U. S. 306; 50 L. ed. 204.

for public use without compensation. We cannot assent to this view. It is the duty, primarily, of a person on whose premises are garbage and refuse material, to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The requirement that the person conveying the material should pay a given price for having it cremated, in effect put some expense on the householder but that gave him no ground for complaint, for it was his duty to see to the removal of garbage and house refuse having its origin on his premises. Still less has the scavenger a right to complain, for his right to convey garbage and refuse through the public streets . . .was derived from the public, and he was subject to such regulations as the authorities might adopt.

The cremation and destruction of garbage and house refuse, under the authority of the municipal authorities, proceeding upon reasonable grounds, and at a place designated by law, as a means for the protection of the public health, cannot be properly regarded within the meaning of the Constitution as a taking of private property for public use without compensation, simply because such garbage and refuse may have had, at the time of its destruction, some element of value for certain purposes.

The city of Detroit had provided by contract for the collection and disposal of all garbage and had prohibited the hauling of garbage by any person not in the employ of the contractor. A man named Gardner was convicted of a violation of the ordinance and appealed on the ground that the ordinance was invalid as depriving householders of property without due process of law.[48] The court referred to the opinion in the San Francisco case which had just been filed and said:

The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking of property without compensation. . . .

It was the controlling obligation of the city to protect the health of its people, and if in its judgment the presence of garbage on the premises of householders would endanger the public health, then it could rightfully require the garbage to be removed and disposed of even if it contains some elements of value. In such circumstances, the property rights of individuals in the noxious materials described in the ordinance must be subordinated to the general good.

d. *Zoning*[49]

During the past half century there has been a growing recognition by the courts that legislation tending to promote the public welfare by

[48] Gardner v. People (1905) 199 U. S. 325; 50 L. ed. 212.

[49] See Williams, F. B., *The Law of City Planning and Zoning*, and Baker N. F., *The Legal Aspects of Zoning*.

restricting the uses of privately owned real estate should be upheld. Beginning in the law of nuisance and the general maxims of the police power, there has been developed in the state and federal courts a favorable attitude toward regulations which tend to make city life more agreeable. From haphazard growth our cities are turning to comprehensive planning for future physical development.

One feature of such plans is a zoning scheme. This usually consists of a set of maps and an ordinance prescribing the rule to be followed as to the use of private property, the height of buildings, and the proportion of any lot which may be built upon, for the whole area of the city. The maps which are referred to in the ordinance are graphic illustrations of the permitted uses. In order to avoid undue discriminations and partiality of treatment, the regulations are established not for each piece of property individually, but according to zones, in each of which uniform rules prevail. For this reason, the scheme is called zoning.

One of the principal problems in a zoning plan is that of establishing restrictions which will be reasonable. Unreasonable or arbitrary rules are liable to be held void as lacking in due process. It is under this point that most of the decided cases fall.

In *Natal v. Louisiana*[50] several persons who had been convicted of violating an ordinance of the city of New Orleans appealed to the Supreme Court on the ground that the ordinance and the procedure under which they had been convicted denied them due process of law. The ordinance forbade the establishment or maintenance of a private market nearer than six squares to a public market. The procedure objected to was a trial in the city recorder's court without a jury. Mr. Justice Gray, who delivered the opinion, said:

> The case is too plain for discussion. By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they must be kept are matters of municipal policy and may be intrusted by the legislature to a city council to be exercised as in its discretion the public health and convenience may require. The ordinance in question was within the authority placed upon the council. A breach of such an ordinance is one of those petty offenses against a regulation of police which in Louisiana, as elsewhere, may be handled by summary proceedings before a magistrate without trial by jury.

The city of St. Louis enacted an ordinance forbidding the establishment and maintenance of dairies or cow stables within the city limits

[50] (1891) 139 U. S. 621; 35 L. ed. 288.

unless the permission of the municipal assembly were first obtained. The ordinance was passed under authority to prescribe limits within which such stables should not be permitted. In a prosecution for a violation of the ordinance it was objected by the defendant that by vesting absolute authority in the municipal assembly to grant or refuse licenses the ordinance denied due process and equal protection of the laws.[51] The Supreme Court said:

> We do not regard the fact that the permission to keep cattle may be granted by the municipal assembly as impairing the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. The question in each case is whether the establishment of a dairy and cow stable is liable to be a nuisance to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power may be abused, but no such complaint is made against the practical application of the law in this case, and we are led to think that none such exists.
>
> We have no criticism to make of the principle of granting a license to one and denying it to others, and are bound to assume that the discrimination is made in the interests of the public, and upon conditions applying to the health and comfort of the neighborhood. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice to individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases.

In a similar case, the city of Little Rock, Arkansas, had prohibited the conduct of livery stables within a designated area. An injunction against the enforcement of the ordinance was sought by a livery stable owner on the ground that the ordinance deprived him of his property without due process of law.[52] He averred that he had conducted his business for many years in the same location without complaint from the public, that he had gone to large expense to provide permanent structures, and to be compelled to seek a new location would work a hardship upon him not warranted by the public welfare. The court, in answering these contentions, said:

> No question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner in which they are to be conducted in a thickly populated city, is well within the range of the power of the state

[51] Fischer *v.* City of St. Louis (1904) 194 U. S. 361; 48 L. ed. 1018.
[52] Reinman *v.* City of Little Rock (1915) 237 U. S. 171; 59 L. ed. 900.

to legislate for the general welfare of the people. So long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment.

The only debatable question arises from the contention that, under the particular circumstances alleged in the complaint, the plaintiffs in error have conducted the livery stable business for a long time in the same location, and at large expense for permanent structures, and the removal to another location would be very costly, and, as the stables are in all respects properly conducted, this particular ordinance must be deemed an unreasonable and arbitrary exercise of the power of regulation. These averments of fact are contradicted by the answer.

The court assumed that the court below adopted such a basis of fact as would most clearly sustain its judgment and sustained a denial of the writ.

An ordinance of the city of New Orleans requiring the segregation of prostitutes into certain limits prescribed in the ordinance was objected to by property owners within the described limits on the ground that the enforcement of the regulation would greatly depreciate the value of their property for residential purposes. An injunction was requested, and refused by the state Supreme Court.[53] Mr. Justice Brewer, in delivering the opinion of the court, said:

The question presented in this case is whether an ordinance of the city of New Orleans prescribing limits outside of which no woman of lewd character shall dwell operates to deprive the plaintiffs in error of any right secured by the Constitution of the United States. In the first place, no woman of that character is challenging its validity. In the second place, no person owning buildings outside the prescribed limits is complaining that he is deprived of a possible tenant by virtue of the ordinance. In the third place, the ordinance does not attempt to give to such characters license to carry on their business in any way in which they see fit, or indeed to carry it on at all. The question, therefore, is simply whether one who may own or occupy property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, can prevent the enforcement of such an ordinance on the ground that by it his rights under the Federal Constitution are invaded.

Obviously, the regulation of houses of ill-fame may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or third, a restriction of the location of such houses to certain defined limits.

[53] L'Hote *v.* City of New Orleans (1900) 177 U. S. 587; 44 L. ed. 899.

> Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state or federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonablesness or propriety of the limits is a matter for legislative consideration, and cannot become a basis for judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any? It is said that this operates to depreciate the value of the property of the plaintiffs in error, but a similar result would follow if other limits were prescribed, and therefore the power to prescribe limits could never be exercised. The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character. There is nothing in the ordinance to deny the ordinary right of the individual to restrain the location of such undesirable persons as private nuisance. Under these circumstances we are of the opinion that the ordinance in question is not one of which the plaintiffs in error can complain.

Many cities, particularly in the South, have attempted various devices for the segregation of negro dwellings into restricted portions of the city.[54] Only one such ordinance has come before the Supreme Court for review. This was a regulation passed by the city of Louisville, Kentucky, "to prevent conflict and ill-feeling between the white and colored races . . . and to preserve the public peace and promote the general welfare by making reasonable provisions, requiring places of abode and places of assembly by white and colored people respectively." By the ordinance it was made unlawful for any colored person to move into and occupy as a residence any house upon any block upon which a greater number of houses were occupied as residences by white than by colored persons. A similar provision forbade white encroachment upon colored residence blocks. Occupancies established before the date of the passage of the ordinance were to be undisturbed.

The question of the validity of the ordinance under the Fourteenth Amendment was presented in an action for the specific performance of a contract to sell property. The defense to the action was that

[54] See note in 1 National Municipal Review 277 (1912) as to other similar ordinances. Also 3 National Municipal Review 177 and Stephenson, Gilbert T., "The Segregation of the White and Negro Races in Cities by Legislation," 3 National Municipal Review 496-504. 5 National Municipal Review 315 reports the adoption of a segregation ordinance by popular initiative.

the use which the buyer proposed to make of the property was prohibited by the ordinance.[55] The Supreme Court said in its opinion:

> The ordinance is a drastic measure, and is sought to be justified under the authority of the state in the exercise of the police power. It is said that such legislation tends to promote the public peace by preventing racial conflicts; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.
>
> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. . . .
>
> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges. As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils; but, in view of the rights secured by the Fourteenth Amendment, such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

An example of arbitrary and unreasonable zoning is furnished by *Dobbins v. City of Los Angeles*.[56] The city had established by ordinance certain limits within which the construction or maintenance of gas tanks or reservoirs was prohibited. Mrs. Dobbins purchased land outside of these limits, secured a building permit, and began the erection of a gas holder. The city council then amended the zoning ordinance to include her property within the prohibited area. The subcontractor brought action to restrain the enforcement of the ordinance, but the Supreme Court held that his interest was not sufficient to sustain the action.[57] Mrs. Dobbins thereupon sought an injunction, in her own name, against its enforcement. Mr. Justice Day, who delivered the opinion of the court, said:

> We think a case is made which called for the protection of the courts against arbitrary interference with the rights of the plaintiff in error. It may be admitted as being a correct statement of law in California that

[55] Buchanan *v.* Warley (1917) 245 U. S. 60; 62 L. ed. 149.

[56] (1904) 195 U. S. 223; 49 L. ed. 169.

[57] Davis & Farnum Mfg. Co. *v.* City of Los Angeles (1903) 189 U. S. 207; 47 L. ed. 778.

notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. The right to exercise the police power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population, or other causes, became a menace to the public health and welfare, and be required to yield to the public good. But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.

In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment.

The general court of Massachusetts provided by law that within a certain district in the city of Boston, which was described in the act, the height of buildings should be limited to eighty feet, or in some cases to 100 feet. Application was made by one Welch to the building commissioner of the city for a permit to erect a building of a height greater than that allowed by law. The permit was denied and Welch sought mandamus to compel the issuance of the permit on the ground that the statute upon which the refusal was based was unconstitutional and void as it would, if given effect, deprive him of his property without due process of law.[58]

Welch attacked the statute in the courts as being based upon aesthetic considerations alone. The state court, however, held the law valid and denied the writ.

The Supreme Court concurred in the view of the state court that regulations as to the height of buildings and in regard to the mode of their construction in cities are valid, assuming that the height and conditions provided for can plainly be seen to be not unreasonable or inappropriate. The court continued:

It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion; high buildings are generally of fireproof con-

[58] Welch *v.* Swasey (1909) 214 U. S. 91; 53 L. ed. 923.

> struction; fire engines are more numerous and much closer together than in the residential portion, and an unlimited supply of salt water can be more readily introduced from the harbor into the pipes; and few persons are found in the business section in the night time. There may be, in the residence section, more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the water front, and many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which, it must be presumed, were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the city. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them.

The city of Los Angeles seems to have borne the brunt of the earlier fight for the recognition of zoning principles. Eleven years after deciding the Dobbins case, which involved zoning for gas works, the Supreme Court was called upon to decide another zoning case from Los Angeles. This time it involved the regulation of brick kilns. As in the former case, the city had by ordinance established certain limits within which brickmaking was prohibited. One Hadacheck was convicted of violating the ordinance and he sought release by habeas corpus, alleging the unconstitutionality of the ordinance, averring that if given effect in his case it would deprive him of his property without due process of law.[59]

It was shown by the testimony that Hadacheck was the owner of a tract of land, within the limits fixed by the ordinance, upon which there was a bed of clay worth $800,000 for brickmaking purposes. It was asserted that the value of the land for residential purposes was not more than $60,000. He had made excavations upon portions of the property which made it unsuitable for residential purposes. The property had been purchased solely for the clay bed it contained, and when it was purchased it was outside the limits of the city and distant from any dwellings. The owner had erected valuable buildings and machinery on the land, which were useful only in connection with

[59] Hadacheck *v.* Sebastian (1915) 239 U. S. 394; 60 L. ed. 348.

the brickmaking industry. It was shown that the city included an area of 107 square miles, about 75 per cent of which was devoted to residential purposes. The district described in the ordinance included only about three square miles, was sparsely settled, and included large tracts of unoccupied land. Hadacheck asserted that the boundaries of the district had been determined for the sole purpose of prohibiting and suppressing his business. He pointed out that other brickyards were permitted to continue their operations in more thickly settled portions of the city with more detrimental results. Finally, he asserted that no prohibitory action could lawfully be taken until the city had made an inquiry as to whether or not a brickyard could be maintained without being a nuisance. Mr. Justice McKenna, who delivered the opinion of the court said in part:

> A vested interest cannot be asserted against it (the police power) because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive condition. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. In the present case there is no prohibition of the removal of the brick clay, only a prohibition within the designated locality of its manufacture into bricks. The petitioner invokes the equal protection clause, but makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination. In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That the petitioner's business was first in time to be prohibited does not make its prohibition unlawful.

The cases which have been so far reviewed under the head of zoning have all involved piecemeal attempts to regulate certain specified uses of property within limits usually smaller than the whole area of the city. The modern conception of zoning demands a comprehensive plan for the whole area of a city and including every type of use. To this, height and area limitations are frequently added.

The first case involving such a comprehensive ordinance was decided by the Supreme Court at its October, 1926, term.[60] A realty company which owned a tract of land in the village of Euclid, Ohio, a suburb of Cleveland, attacked the zoning ordinance of the village

[60] Village of Euclid *v.* Ambler Realty Co. (1926) 272 U. S. 365; 47 Sup. Ct. Rep. 114. 71 L. ed. 303.

under the Fourteenth Amendment. The company wished to sell its property for industrial uses which under the ordinance were not permitted upon a large part of the tract. Mr. Justice Sutherland, who wrote the opinion of the court, reviewed the progress of zoning laws and ordinances and their reception by state courts. He remarked:

> Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . .
>
> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . .
>
> The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view.
>
> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the com-

ing of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances. If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises, including those of the apellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.

Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise involving them.

At the same term, the Supreme Court was called upon to consider the comprehensive zoning ordinance of the city of Los Angeles.[61] This was a proceeding in mandamus to compel the issuance of a building permit notwithstanding the provisions of the zoning ordinance,

which the petitioners alleged was unconstitutional under the Fourteenth Amendment. This opinion was also delivered by Mr. Justice Sutherland who referred to the decision in *Euclid v. Ambler Realty Co. (supra)* and said:

> The effect of the evidence is to show that the entire neighborhood at the time of the passage of the zoning ordinance was largely unimproved, but in course of rapid development.
>
> The council, upon these facts, concluded that the public welfare would be promoted by constituting the area, including the property of the plaintiffs in error, a zone B district, and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

The warning given by the Supreme Court in the Euclid case that not all such zoning ordinances might be constitutional as applied to specific pieces of property was soon shown to be well taken.[61a] The city of Cambridge, Massachusetts, sought by such an ordinance to restrict to residential uses a tract lying in an industrial area. The owner sought a permit to build, which was refused. He appealed. The master who investigated the problem for the lower court reported that the districting of the land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of the part of the city in question. While the Supreme Court expressed extreme reluctance to substitute its judgment for that of the zoning authorities, it pointed out that the relation of zoning to the police power was direct, and that in the absence of necessity, based upon that power, zoning became unreasonable and void under the Fourteenth Amendment. The ordinance was therefore held invalid as to the particular piece of property involved.

As has been pointed out above, zoning ordinances frequently provide regulations not only of uses for property, but also of height and area. Area limitations are usually defined in two ways: first, by the fixing of a maximum percentage of the area of a lot which may be built upon, and, second, by prescribing the minimum dimensions for side, back, and front yards, courts, and area ways. One method of

[61] Zahn *v.* Board of Public Works (1927) 274 U. S. 326; 47 Sup. Ct. Rep. 594; 71 L. ed. 1074.

[61a] Nectow *v.* City of Cambridge (1928) 277 U. S. 183; 48 Sup. Ct. Rep. 447; 72 L. ed. 842.

establishing front-yard depths is by the establishment of a building line. This is an imaginary line drawn parallel to the street upon which the houses face, at a certain distance from the street line, beyond which no building may project. These lines have been established in various ways. A favored method has been to establish them by ordinance upon the line which has customarily been observed upon the street in question. This custom is determined by the set-back of a certain percentage (say ¾) of the existing structures. A second method is to allow a board or individual to fix the lines upon petition of the property owners. One type of this method was brought before the Supreme Court for review in *Eubank v. City of Richmond.*[62]

Here the ordinance directed the street committee of the council upon petition of two-thirds of the property owners in any block to establish a building line on the line of a majority of the houses then erected, provided this line was not closer than five feet nor farther than thirty feet from the street. Eubank applied for a permit to erect a building and was informed that it must be kept fourteen feet from the street. He built the structure at the required distance all but a bay window, which projected three feet over the line. He was arrested and charged with a violation of the ordinance. He defended upon the ground that the ordinance was invalid as depriving him of his property without due process of law.

The court in deciding the case did not pass upon the power of a city to establish building lines, but confined itself to a consideration of the ordinance. Mr. Justice McKenna said:

> The ordinance in question leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots. This control by persons of the property of others is the vice of the ordinance, and we think an unreasonable exercise of the police power.

Soon after the decision of the Euclid zoning case the Supreme Court had occasion to review a zoning ordinance of the city of Roanoke, Virginia, establishing a building line.[63] Here the ordinance established the line in each block at least as far from the street as that occupied by 60 per cent of the existing houses in the block. The council

[62] (1912) 226 U. S. 137; 57 L. ed. 156. For contemporary discussion and criticism of this case see Collins, C. W., "Local Self Government and the Fourteenth Amendment," 3 National Municipal Review 349-354.

reserved itself the power to make exceptions. The petitioner owned several lots in a residence district. He requested permission from the council to erect a building up to the street line. The council granted his permission to approach within 34 2-3 feet of the street but no further. He sought mandamus to compel the issuance of the permit he requested, alleging the unconstitutionality of the ordinance under the Fourteenth Amendment. The court said:

> The contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. Upon that question the decisions are divided as they are in respect of the validity of zoning regulations generally. . . . In consonance with the principles announced in the Euclid case, and upon what, in the light of present-day conditions, seems to be the better reason, we sustain the view put forward by the latter group of decisions. *Eubank v Richmond*, which is petitioner's main reliance upon this point, presented an altogether different question.

In three cases the Supreme Court has had occasion to consider the validity of city ordinances regulating and restricting the business of outdoor advertising. The earliest of these arose in the city of New York from an ordinance prohibiting the use of the public streets for advertising purposes. The Fifth Avenue Coach Company, which used the sides of its buses for advertising purposes, objected to the ordinance on the ground that it would deprive it of its property without due process of law.[64] The Supreme Court said:

> We cannot say that the ordinance was an arbitrary exercise of the police power. . . . If such rights exist in the plaintiff they exist in all wagon owners, and there might be such a fantastic panorama on the streets of New York that objection to it could not be said to have prompting only in an exaggerated aesthetic sense.

Six years later the court had under consideration an ordinance of the city of Chicago regulating the erection and maintenance of billboards in residence districts. One provision was that no billboard should be erected in any block in which one-half of the buildings on both sides were used exclusively for residence purposes, unless consent should first be obtained in writing from the owners of a majority of the frontage of the property on both sides of the street in the block. Such written consents were required to be filed with the commissioner of buildings before a permit would be issued. A billboard company

[63] Gorieb *v.* Fox (1927) 274 U. S. 603; 47 Sup. Ct. Rep. 675. 71 L. ed. 1228.

[64] Fifth Ave. Coach Co. *v.* City of New York (1911) 221 U. S. 467; 55 L. ed. 815.

applied for an injunction against the enforcement of the ordinance as an arbitrary exercise of the police power which, if enforced, would deprive it of its property without due process of law.[65] Mr. Justice Clark, who delivered the opinion of the court, said:

> Neglecting the testimony which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves, and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health, and decency of the community. The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street. The plaintiff in error cannot be injured, but obviously may be benefited, by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute.
>
> To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exercise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality.[66] Such treatment is plainly applicable to offensive structures.

Another billboard ordinance, this time that of St. Louis, came before the court two years later. Here the ordinance required that no billboard of a superficial area exceeding twenty-five square feet should be erected without a permit. No board might exceed a height of fourteen feet. An open space of four feet was required between the bottom of the board and the ground, and a clearance of six feet between the board and any building or the side of the lot upon which the board was built. It could not be closer than two feet to any other billboard, or fifteen feet to the street line. Conformity to a building line was required and no board could exceed 400 square feet in area. The fee for the permit was one dollar for each five lineal feet.

In a suit for injunction to restrain the enforcement of the ordinance, it was stated that the size of posters had been standardized and could not be changed without great expense, that the limits of size fixed by the ordinance were too small for such posters. The boards were alleged to be all upon private ground. They were, according to the bill, constructed to withstand very high winds and were fireproof

[65] Thos. Cusack Co. *v.* City of Chicago (1917) 242 U. S. 526; 61 L. ed. 472.

[66] See McBain, H. L., "Law Making by Property Owners," 36 Pol. Sci. Quar. 617-741 (1921) for a criticism of this practice.

as they were practically all of metal.[67] The opinion of the court, which was delivered by Mr. Justice Holmes, reads in part as follows:

> It is true that, according to the bill, the plaintiff has done away with dangers from fire and wind, but, apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases. Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether.

2. Due Process in Public Utility Regulation[68]

In a strict classification scheme, the subject matter which will be presented under this head would be included under the preceding one, as the regulatory measures which will be discussed here are all professedly enacted under the police power. But there was such a considerable group of cases on public utility regulation both as to operation and as to rates, that it was thought to merit separate consideration.

The first cases to be considered under this head involve general police regulations. One of the most common police requirements is that of securing a license or paying a license fee. We have already reviewed a number of cases presenting questions as to the validity of city ordinances imposing license fees under the commerce clause and under the contract clause. It now remains to consider this subject under the due process clause.

It will be remembered that there is some confusion in the cases due to the difficulty of distinguishing between license fees as valid police powers of taxation. This distinction becomes necessary, for our purposes, only when a reasonable police power measure could be upheld and a taxing measure could not, or *vice versa*. The first question involved in a solution of the problem is whether or not the municipality making the regulation is authorized by its charter to make it under the police power or under the power of taxation or both. This is a matter of state law, and when it is once decided by the state courts it will not

[67] St. Louis Poster Adv. Co. *v.* City of St. Louis (1919) 249 U. S. 269; 63 L. ed. 599

[68] See 12 C. J. 1217.

be re-examined and revised by the Supreme Court except in cases of obvious error.

Once this point is decided, we find that the Supreme Court will examine these regulations to determine their character and validity under federal law. The principal criterion which seems to have been evolved to distinguish between police and taxing measures is whether or not the securing of a license or permission from the municipality is made a condition precedent to authority lawfully to carry on the business for which the license is required. If such a condition is expressed in the ordinance, it is held to be a police regulation. If, on the other hand, the ordinance merely requires the payment of a sum of money by the business and provides that the payment shall be enforced not by a stoppage of the business, but by a seizure and sale of property in an action of debt, the imposition is clearly a tax measure.

If the regulation is one solely of internal police, the fee imposed as a condition of the issuance of a license may not exceed the reasonably anticipated expenses of issuing the license and carrying out the inspection, supervision, or regulation contemplated by the ordinance. If it greatly exceeds this sum, it will be held unreasonable and a deprivation of property without due process of law. It should be noted, however, that there are cases holding that where a municipality has power to enact both police and tax measures it is no objection that they may be combined. The excess in the fee in such a case would be held to be a valid tax. Of course, this raises some question as to the manner of enforcing payment of the fee—whether a stoppage of the business could be resorted to, in order to enforce payment of the whole amount, or whether only a civil action would lie, or whether the fee would be separable and a separate remedy would be pursued for each portion. The cases do not present a solution to this problem. But it is evident that where a police regulation alone is authorized, an excessive fee is invalid.

This is shown by two cases from Pennsylvania involving the regulation of telepraph companies. As we have seen, telegraph property used in the transmission of interstate messages is an instrumentality of interstate commerce. State taxation upon the *business* of transmitting interstate messages is forbidden by the commerce clause, although state taxation of the *property* at the same rate as other property in the state is valid. We have also seen that a rental charge for the use of the public streets will be upheld if reasonable in amount. But the boroughs

of Taylor and New Hope in Pennsylvania attempted to lay a charge upon the telegraph company at a certain rate for each pole and mile of wire for the avowed purpose of defraying the expense of issuing a license and maintaining an inspection of the company's property. The company, in actions by the boroughs to recover the fees, replied that they were unreasonable in amount and grossly disproportionate to the expenses incurred by the boroughs.[69]

In the New Hope case, the jury in the lower court awarded the borough a judgment against the company for a less amount than that due under the ordinance if valid. The company rightfully contended in its appeal that this verdict was an admission that the fees fixed by the ordinance were unreasonable. The Supreme Court agreed with this contention, pointing out that the jury had, by its action, attempted to make itself a taxing body.

In the Taylor case the company rested its case upon the contention that the ordinance was unreasonable and void because designed to produce revenue, that the borough was under no expense in issuing the license, or for the inspection of poles and wires. It was proved that the borough had never undertaken any inspection or incurred any expense on account of the telegraph poles or wires. In the opinion of the court, Mr. Justice Peckham said:

> Upon the averments in the affidavit of defense, which in this proceeding must be taken to be true, we can come to no other conclusion than that the ordinance was void because of the unreasonable amount of the license fee provided for therein. It was urged in the argument that this ordinance was a proper police regulation, and that the collection of revenue was not its object; that it was the duty of the borough officials to protect the lives of its citizens, and that in the discharge of such duty it had the right to inspect the poles and wires for the purpose of seeing that they were safe. There is no doubt that, for the purpose mentioned, the borough had the right claimed by its counsel. The averments of the affidavit of defense, however, show that no duty has been discharged or attempted to be discharged by the borough. It has done absolutely nothing to protect the lives and property of its citizens by inspecting the wires and poles of the defendant.
>
> Courts are not to be deceived by the mere phraseology in which the ordinance is couched, when the action of the borough, in light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expense or provide for the liabilities incurred in the way of inspection or supervision.

[69] Postal Telegraph Cable Co. *v.* Borough of New Hope (1904) 192 U. S. 55; 48 L. ed. 338; same *v.* Borough of Taylor (1904) 192 U. S. 64; 48 L. ed. 342.

In *Sullivan v. City of Shreveport*[70] the city had sought by ordinance to prohibit the use upon the local street railway of "one-man" streets cars by requiring a crew of two upon all cars. The superintendent of the company was arrested because of a violation of the ordinance. He contended that the ordinance was invalid because it deprived the company of its property without due process of law. The defense introduced evidence tending to show that the new type of "one-man" car was so equipped as to make its operation as safe for the public as that of the two-man cars. Mr. Justice Clarke, who delivered the opinion of the court, said:

> The question presented is whether the ordinance which was confessedly a valid exercise of the police power when passed, was rendered arbitrary and invalid by the development of a car which, it is claimed, can be operated by one man with as much safety to the traveling public, and with less cost, than was secured by the two-man car in use at the time the ordinance was passed, and which was contemplated by it. It is not necessary to decide in this case whether a valid regulating ordinance can be rendered invalid by a change of conditions which renders it arbitrary and confiscatory, for the claim that such a change of condition had arisen in the case is stoutly disputed by the city authorities. There is testimony tending to show that the new cars are not as good as the company contends. These one-man cars at the time of trial were as yet experimental, and enough has been said to show that in each community the operation of street cars presents such special problems that, with peculiar appropriateness, they have been committed by the law primarily to the disposition of the local authorities, whose determination will not be disturbed by the courts, except in cases in which the power has been exercised in a manner clearly arbitrary and oppressive. Since the record, as we have thus discussed it, fails to show a clear case of arbitrary conduct on the part of the local authorities, the judgment of the Supreme Court of Louisiana is affirmed.

The next group of cases deals with regulation of the use of streets by public utility companies. As a general rule, any reasonable regulation calculated to promote the public safety will be upheld against the contention that it denies due process. Thus a prohibition of the use of steam engines in a public street of Richmond, Virginia, was sustained.[71] And numerous restrictions upon the use of the main street of Goldsboro, North Carolina, by a railroad company were upheld.[72]

[70] (1919) 251 U. S. 169; 64 L. ed. 205.

[71] Richmond F. & P. R.R. Co. *v.* City of Richmond (1878) 96 U. S. 521; 24 L. ed. 734.

[72] Atlantic Coast Line R.R. Co. *v.* City ofGoldsboro (1914) 232 U. S. 548; 58 L. ed. 721.

It should be noted, however, that both of these cases probably would have been decided differently if the effect of the regulation had been unreasonably to restrict the primary functions of the railroad company under its charter. In the Richmond case, this is brought out by the remark of the court that the portion of track upon which the restriction was imposed was not the main line of the railroad. In the Goldsboro case, it is shown by the court's care in stating that the company . . . devotes its property in part to public uses that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. The reference was to the switching of cars and the standing of cars for unloading. In such a case the state may legitimately exercise the police power.

The police power may not extend, however to an appropriation of the property of a railroad company for a public use. This is shown by a recent case from New Jersey.[72a] Here, the town had attempted, by ordinance, to establish a public cab stand on the property of the railway, which never had been dedicated as a public highway. The Supreme Court held this to constitute deprivation of property without due process of law.

In *Wabash Railroad Co. v. City of Defiance*,[73] the city had passed an ordinance requiring the company to remove two overhead highway bridges and construct a grade crossing. The company, among other contentions, objected to the terms of the ordinance in so far as they attempted to impose upon it any part of the cost of the change and failed to make any provision for compensation. The court said, "Assuming, but not deciding, that the railway company was entitled to compensation for the bridge, it appears that the resolutions changing the grade were duly published and that the company did not file a claim for damages as required by the resolution." The company was held to be estopped by its failure to file such a claim.

The city of Omaha, Nebraska, by ordinance directed a railroad company at its own expense to construct a viaduct to carry the traffic of a certain street over its tracks. The company sought to enjoin the enforcement of the ordinance because of its alleged repugnance to the Fourteenth Amendment.[74] The company admitted its liability to con-

[72a] Delaware L. & W. R.R. Co. *v.* Town of Morristown (1928) 276 U. S. 182; 48 Sup. Ct. Rep. 276; 72 L. ed. 523.

[73] (1897) 167 U. S. 88; 42 L. ed. 87.

[74] Missouri Pacific Ry. Co. *v.* City of Omaha (1914) 235 U. S. 121; 59 L. ed. 157.

struct such a viaduct for vehicles and pedestrians, but asserted that it was under no legal obligation to provide for street railway traffic and that in so far as the cost of the required structure exceeded that sufficient to care for the traffic aside from street cars, its property would be taken without due process of law. Mr. Justice Day, in delivering the opinion of the court, said:

> It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have made such division of expenses. But there is nothing in the statute requiring the municipality to divide the expense of such improvement among those responsible for the dangerous condition of the street crossing. In placing the expense entirely upon the railroad company, whose locomotives and trains are principally responsible for the resulting danger to the public, we do not find such abuse of the recognized authority of the state as has justified the courts in some cases in enjoining the enforcement of state and municipal legislation.

The city of Chicago, in order to render the Chicago River more suitable for navigation by large vessels, passed an ordinance requiring a street railway company to lower, at its own expense, a tunnel which it had constructed under the river. The company alleged, among other things, that the ordinance was a denial of due process.[75] The court by a five-to-four decision held the requirement of an uncompensated obedience to the ordinance did not deny due process.

It has been for many years a common requirement in street railway franchises that the company should keep the space between its tracks and for a specified distance outside of them in good repair. It is probable that these provisions arose partly because the cars were moved by animal power and these animals wore out the paving between the tracks, partly because of the frequent necessity of tearing up the track and ties for repairs, partly upon the theory that the track and the short distance beyond it were used exclusively by the cars, and finally because the companies were not adverse to agreeing to such conditions in order to secure their franchises.

It is more or less obvious that, under modern conditions, the necessity for such a requirement is no longer so great as it once was. Practically all such tramways are now using electricity for motive power, the advent of automobiles has caused an intensive use by motor vehicles

[75] West Chicago St. R.R. Co. *v.* Peo. ex. rel. City of Chicago (1906) 201 U. S. 506; 50 L. ed. 845.

of the portion of the street upon which car tracks have been laid except when it is actually occupied by a street car, and rails and ties are now laid permanently in concrete while the rails themselves are electrically welded. During recent years, there has been a widespread attempt by street railway companies, in securing franchise renewals, to have these paving construction and maintenance charges stricken out. In some cases, the company has been successful; in others, although the franchise still requires it, the company has opposed attempts to make it meet its obligation. Two cases of this latter kind have been presented to the Supreme Court and in both the company has been held liable.[76]

In the case arising in Milwaukee, the company, in addition to presenting the question of its liability, which was decided adversely to it, alleged that it had been denied the equal protection of the laws because, after the entry of the judgment in the state court and bfore the hearing in th United States Supreme Court, the Supreme Court of the state had decided another case which it alleged was not reconcilable with its decision in its case. The Supreme Court, speaking through Mr. Justice Brandeis, said:

> The Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, any more than in guaranteeing due process it assures immunity from judicial error. The company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

Even such a temporary improvement as street sprinkling may be required of a street railway as a valid police measure under the authority of *Pacific G. & E. Co. v. Police Court of Sacramento*.[77] The city had, by ordinance, required every street railway company, during the period from June to October, to sprinkle with water the surface of the street between the rails and for a sufficient distance outside the rails to prevent dust from arising when the cars were in operation. The city alleged that the ordinance was a valid and reasonable exercise of the police power and could be enforced against the company without denying it any constitutional right. The Supreme Court agreed.

An ordinance of the city of Richmond, Virginia, granting to a railroad company certain rights in a city street, when attacked by a

[76] Southern Wisconsin Ry. Co. *v.* City of Madison (1916) 240 U. S. 457; 60 L. ed. 739; Milwaukee E. R. & Lt. Co. *v.* State ex rel. City of Milwaukee (1920) 252 U. S. 100; 64 L. ed. 473.

[77] (1919) 251 U. S. 22; 64 L. ed. 112.

property owner who claimed that his property had been damaged by it without due process, was held to be *damnum absque injuria.*[78]

A public utility company possesses two kinds of rights which should be distinguished. The first is a franchise right, which is a grant from the state to use public property for a private or quasi-public purpose. This grant usually is limited in time and upon the expiration of this time limit the franchise rights all terminate. The second type of right is that which it has in its physical property. This property right does not expire with the franchise unless the company has voluntarily relinquished it by contract. But, when the franchise expires, the right to operate the property in the streets for the purpose for which it was constructed is gone. Hence, about all the company can do is to sell the property to the city or to the subsequent franchise holder or remove it unless a franchise extension can be secured.

In *Cleveland Electric Ry Co. v. City of Cleveland*,[79] the city sought by ordinance, upon the expiration of a franchise, to transfer a portion of the company's property to a new franchise holder. The Supreme Court held this attempt to divest the older company of its property rights to be void under the Fourteenth Amendment.

Upon the expiration of the street railway franchise in the city of Detroit, the city ordered the tracks removed from the streets within ninety days. The company claimed that this was a taking of its property without due process of law.[80] The court, however, pointed out that the company had taken the grants with full knowledge of their duration, and it could not claim an implied contract to continue the use of the streets after their expiration.

A few years later the same company sought to prevent the city from voting bonds and acquiring or building a street railway system. It appeared that upon the expiration of the franchise, instead of carrying out their first purpose, to require the immediate removal of the street railway tracks, the city entered into a day-to-day arrangement with the company to continue the operation of the lines. The charge was made in the bill that the city officials were engaged in a scheme to compel the company to part with its property at a sum much less than its fair value, or to cease to operate in the streets and to remove its property therefrom. To give effect to this scheme, it was averred,

[78] Meyer *v.* City of Richmond (1898) 172 U. S. 82; 43 L. ed. 374.

[79] (1907) 204 U. S. 116; 51 L. ed. 399.

[80] Detroit United Railway Co. *v.* City of Detroit (1913) 229 U. S. 39; 57 L. ed. 1056.

would work a deprivation of the complainant's property without due process of law. In answer to these contentions, the court said:

> Where a street railway company, operating in the streets of the city under a franchise granted for a definite term, has enjoyed the full term of the grant, the municipality may upon failure of renewal of the grant, require the company, within a reasonable time, to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the Federal Constitution, or depriving the street railway of its property without due process of law. If the city has the right to acquire the property on the best terms it can make with the company, in view of the expiration of the franchise, an attempt to carry on such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. Being under no obligation to purchase, the city is free to name its own terms.
>
> We find nothing in the allegations of this bill establishing that the city, in proceedings by its officials in the manner alleged, has done things which are subversive of the rights of the city to establish its own municipal system of street railways and to issue bonds for that purpose, or which would amount to deprivation of rights secured to the plaintiff by the Fourteenth Amendment to the Federal Constitution.

Although a city may, in the proper exercise of its police power, regulate the use of the streets by public utilities, it may not impose onerous burdens upon such a utility which redound not to the benefit of the people, but to that of the city as owner and operator of a competing utility system. The city of Los Angeles passed an ordinance providing for a municipal electric street-lighting system and requiring the removal and relocation of poles, wires, and other property of any public utility company as necessary, in order that the municipal system might be constructed, operated, and maintained. Upon application for an injunction the city was restrained from interfering with the property of a certain public utility company in the city. The city appealed.[81] Mr. Justice McKenna delivered the opinion of the court. He said, in part:

> There is no question of the right of the city to erect a lighting system of its own. The only question is whether the city may, as matter of public right and without compensation, clear a space for the instrumentalities of its system by removing or relocating the instrumentalities of other systems. The city asserts the right to displace other systems as an exercise of the police power, and as an incident of its legislative power.

[81] City of Los Angeles *v.* Los Angeles G. & E. Corp. (1919) 251 U. S. 32; 64 L. ed. 121.

> The city has undoubtedly the function of police. It undoubtedly has the power of municipal lighting and the installation of its instrumentalities, but function and power may be exceeded, and, so far as wrongful, be restrained.

In what way the public peace or health or safety was imperiled by the lighting system of the corporation, or relieved by its removal or change, the court was unable to see. The court reasoned and concluded that what the city did was done not in its governmental capacity, but in its proprietary or quasi-private capacity, and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field.

A considerable group of cases deals with the question of public-utility rates and with attempts by municipalities to fix such rates in such a way as best to secure the public interest without depriving the utility of its property without due process of law. These cases usually come before the courts upon complaint of the utility company that rates fixed by municipal ordinance are confiscatory. The whole matter is then usually assigned to an expert master for investigation. As the question of the adequacy of rates depends primarily upon the value of the property of the company actually used in rendering the public service, one of the first tasks of the master is to determine this value. This may be done upon any one of a number of different bases, i.e., cost less depreciation, reproduction cost, etc. Then he must determine what rate of return upon this investment is reasonably necessary. By comparing the probable net income with this return he is enabled to judge whether the established rate is confiscatory. He then reports to the trial court where his report is approved, with or without modifications. If either party is dissatisfied he may appeal, if a constitutional question can be presented.[82]

When a rate case comes before the Supreme Court it usually takes one of three courses. It may hold the rates valid, it may hold them invalid, or it may order that they be given a trial to determine by experience whether confiscation will result. Many cases fall under this last head.[83]

[82] Mathews, N. and Thompson, W. G., "Public Service Company Rates and the Fourteenth Amendment," 15 Harv. L. R. 33, 353. Dec., 1901, Jan., 1902. See also 12 C. J. 1280.

[83] Willcox *v.* Consolidated Gas Co. (1909) 212 U. S. 19; 53 L. ed. 382. City of Knoxville *v.* Knoxville Water Co. (1909) 212 U.S. 1; 53 L. ed. 371. City of Louisville *v.* Cumberland T. and T. Co. (1912) 225 U. S. 430; 56 L. ed. 1154. Cedar Rapids G. L. Co. *v.* City of Cedar Rapids (1912) 223 U. S. 655; 56 L. ed. 594. Des

Cases holding rates invalid are not numerous.[84] The court has said that it will not invalidate a rate ordinance unless the rates established by it would clearly result in confiscation. On the other hand, rates are upheld as reasonable in several cases.[85]

As we noted in the chapter on the contract clause, a municipality may, by contract, divest itself of the power to fix rates for a limited period if authorized to do so by law. Where rates have been so fixed by contract the utility company cannot, during the term of the franchise contract, complain that rates so fixed are unremunerative and hence a deprivation of property without due process of law. Several such contracts made before the World War were so onerous upon the companies operating under them that they sought to increase their rates in disregard of the provisions of the contracts. In each such case the Supreme Court has denied relief, although recognizing that the contracts are disadvantageous to the company.[86]

3. Due Process in Taxation[87]

The taxes levied and collected by municipalities may be classified as (1) general, (2) occupation or license, and (3) special assessment. For convenience, the cases in this section will be considered in groups corresponding to the classes suggested.

Moines Gas Co. *v.* City of Des Moines (1915) 238 U. S. 153; 59 L. ed. 1244. Lincoln Gas & E. L. Co. *v.* City of Lincoln (1919) 250 U. S. 256; 63 L. ed. 968. Ex Parte Lincoln Gas & E. L. Co. Petitioner (1921) 256 U. S. 512; 65 L. ed. 1066. Ex Parte Lincoln Gas & E. L. Co. Petitioner (1921) 257 U. S. 6; 66 L. ed. 101. Galveston Elec. Co. *v.* City of Galveston (1922) 258 U. S. 388; 66 L. ed. 678. Brush Elec. Co. *v.* City of Galveston (1923) 262 U. S. 443; 67 L. ed. 1076.

[84] City and County of Denver *v.* Denver Union Water Co. (1918) 246 U. S. 178; 62 L. ed. 649. Detroit United Railway Co. *v.* City of Detroit (1919) 248 U. S. 429; 63 L. ed. 341. Southern Iowa Elec. Co. *v.* City of Chariton, Iowa Elec. Co. *v.* City of Fairfield, Muscatine Ltg. Co. *v.* City of Muscatine (1921) 255 U. S. 539; 65 L. ed. 764. City of San Antonio *v.* San Antonio P. S. Co. (1921) 255 U. S. 547; 65 L. ed. 777. City of Houston *v.* Southwestern Bell Tel. Co. (1922) 259 U. S. 318; 66 L. ed. 961. City of Paducah *v.* Paducah Ry. Co. (1923) 261 U. S. 267; 67 L. ed. 647.

[85] San Diego Land & Town Co. *v.* City of National City (1899) 174 U. S. 739; 43 L. ed. 1154. Same *v.* County of San Diego (1903) 189 U. S. 439; 47 L. ed. 892. Stanislaus Co. *v.* Joaquin & King's River C. & I. Co. (1904) 192 U. S. 201; 48 L. ed. 406. Tampa Waterworks Co. *v.* City of Tampa (1905) 199 U. S. 241; 50 L. ed. 170. Home Tel. & Tel. Co. *v.* City of Los Angeles (1908) 211 U. S. 265; 53 L. ed. 176. Newark Natural Gas & Fuel Co. *v.* City of Newark (1917) 242 U. S. 405; 61 L. ed. 393.

[86] Columbus Ry. P. & L. Co. *v.* City of Columbus (1919) 249 U. S. 399; 63 L. ed. 669. St. Cloud Public Service Co. *v.* City of St. Cloud (1924) 265 U. S. 352; 68 L. ed. 1050. City of Opelika *v.* Opelika Sewer Co. (1924) 265 U. S. 215; 68 L. ed. 985. Southern Utilities Co. *v.* City of Palatka (1925) 268 U. S. 232; 45 S. C. R. 488. 69 L. ed. 930.

[87] See 12 C. J. 1255.

Of the many problems which might be presented to the Supreme Court respecting the validity of general taxes for municipal purposes, only two appear in the decided cases. The first of these is as to whether or not property must be benefited by municipal services and organization to the amount of its tax for general purposes in order to avoid a denial of due process. This question was answered in the negative in *Henderson Bridge Co. v. City of Henderson*.[88] In this connection the Supreme Court said:

> In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government.

The second question is as to whether taxes may be laid for a private purpose. This question was answered in the negative in the leading case of *Citizens' Savings and Loan Association v. Topeka City*.[89] Here the city had issued bonds in aid of a private manufacturing enterprise and action had been brought to recover the interest on these bonds. The city had been given adequate charter power to issue the bonds, if the charter provision was valid.

The court in discussing the power of taxation did not specifically assert that the due process clause had been violated. But the Fourteenth Amendment is the constitutional provision which is usually cited today as authority against taxation for a private purpose. What the court did say was:

> The act authorizes the municipalities to which it applies to take the property of the citizen under the guise of taxation and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use. If these municipal corporations, which are, in fact, subdivisions of the state, and in which for many reasons are vested quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature to authorize them to use it in aid of the projects strictly private or personal, but which would in a secondary manner contribute to the public good. But such instances are few and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payment from some

[88] (1899) 173 U. S. 592; 43 L. ed. 823.
[89] (1875) 20 Wall. 655; 22 L. ed. 455.

other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

Since the decision in the Topeka case, three others involving the same point have been presented and decided. It will be noted that all of them arose within a decade after the Topeka case. The first of these, *Commercial National Bank v. Iola City*[90] was decided upon the authority of the Topeka decision.

The second case involved bonds issued by the city of Ottawa, Illinois, to aid in the development of water power near the city by a private individual.[91] While the question of taxation for a public purpose was not squarely presented, and the court disposed of the case on the ground that the plaintiff was not a holder in due course, it indicated, by way of dictum, that even if the city had been authorized to issue bonds for water power improvement (which the state court held it had not) still no donation to a private person for that purpose could have been made.

The third case presented facts almost identical with those in *Loan Association v. Topeka (supra)*. The city of La Grange, Missouri, had issued bonds as a donation to an iron and steel company pursuant to an act of the legislature.[92] Here the court said:

> The general grant of legislative power in the constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or of taxation, to take private property without the owner's consent for any but a public project, nor can the legislature authorize counties, cities, or towns to contract for private objects debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers in their private business.

One other case which falls within this general class has been presented in *Joslin Mfg. Co. v. City of Providence*.[93] Here certain taxpayers of the city of Providence sought to restrain the city from proceeding to acquire land for a water reservoir, on the ground that the act under which the taking was authorized would deprive them of property without due process of law. They specifically alleged that a section of the act authorized an expenditure of money raised by

[90] (1875) 22 L. ed. 463.

[91] City of Ottawa *v.* Wm. H. Carey (1883) 108 U. S. 110; 27 L. ed. 669.

[92] Cole *v.* City of La Grange (1885) 113 U. S. 1; 28 L. ed. 896.

[93] (1923) 262 U. S. 668; 67 L. ed. 1167.

taxation in the city for the benefit of other municipalities and persons outside the city. The court, speaking through Mr. Justice Sutherland, said:

> That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed, but that is not the case here presented. . . . The legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another.

The cases involving license taxes deal principally with questions of classification. For a classification to be reasonable it must bear some relationship to the object to be attained.

The city of Titusville, Pennsylvania, passed an ordinance imposing a license tax upon persons who carried on certain occupations in the city. Persons in different occupations were to pay different amounts and persons in the same occupations were classified according to the amount of their sales. A retail grocer attacked the classification for that occupation as arbitrary and unreasonable.[94] The court sustained the classification as reasonable. Equality was said to exist within each class. The basis of classification, i. e., sales, was approved.

In *Bradley v. City of Richmond*[95] a private banker objected to a classification for taxing purposes under a city ordinance. Here the court again upheld the plan of classification and pointed out in addition that an opportunity for hearing had been given and the plaintiff in error had failed to protest. It should be noted in connection with this case that here the license tax fulfilled a dual purpose—as a regulatory and as a revenue measure. As this feature was approved by the state courts it was not questioned by the Supreme Court.

The city of Chicago enacted an ordinance requiring licenses for places of public amusement. The license fee was graduated according to the price charged by each theater for its seats. There were twenty-one classes. A theater company complained that there was no necessary relation between the price of admission and the ability to pay a license tax or the necessity of police regulation; hence, that the classification scheme was arbitrary and void under the Fourteenth Amendment.[96] The Supreme Court assumed that the ordinance was a revenue measure only. It was pointed out in the opinion that contrary to the assertions of the company there was a natural relation between the price of admission and revenue.

[94] Clark *v.* City of Titusville (1902) 184 U. S. 329; 46 L. ed. 569.

[95] (1913) 227 U. S. 477; 57 L. ed. 603.

[96] Metropolis Theater Co. *v.* City of Chicago (1913) 228 U. S. 61; 57 L. ed. 730.

> The problems of government are practical ones, and may justify, if they do not require, rough accommodations, illogical though they may be, and unscientific. But even such criticism should not hastily be expressed. What is best is not always discernible; the wisdom of any choice may be disputed and condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void under the Fourteenth Amendment, and such judgment cannot be pronounced of the ordinance in controversy.

A special example of classification is presented by a final case under this head. The legislature of Delaware in amending the charter of the city of Wilmington in 1913 authorized an assessment of telegraph lines in the city at not less than $6,600 and not more than $7,300 for each mile of the streets used. The rate of taxation was the same as upon other property. The company objected to taxes levied upon this basis on the ground that an arbitrary valuation had been fixed without giving the company a chance to be heard at any time before the tax was levied. It further averred denial of equal protection in the valuation of its property on this basis while other property was valued on its market price. The state court answered this by the observation that the tax was a license for a privilege.[97]

The Supreme Court, while more or less dissatisfied with the conclusions of the state supreme court, declined to overrule its decision, on the ground that the question involved was largely of local law. The tax was held to be justifiable as a fee for the privilege of occupying the streets. The valuation was not of the property, which the company showed was worth only $500 per mile, but of the privilege of using the public highways.

The final group of cases to be considered under this head involves due process in special assessments. This type of taxation is governed by different rules than those which control general taxes. In order that a special assessment may legally be levied, a public improvement must have been made which has resulted in a benefit to the property equal to or greater than the tax. The existence and extent of this benefit must be determined in such a way that the property owner is given an opportunity to be heard. So both procedural and substantive rights under the Fourteenth Amendment may be involved.

Such was the case in *Paulsen v. City of Portland*,[98] where a city sewer assessment was attacked both on the ground that the property

[97] New York P. & N. Telegraph Co. *v.* Dolan (1924) 265 U. S. 96; 68 L. ed. 916.
[98] (1893) 149 U. S. 30; 37 L. ed. 637.

could not be benefited by the sewer and that no proper notice had been given. The objection was based upon the fact that the city charter did not clearly require notice. The court pointed out, however, that, regardless of what the charter said, the course which had actually been followed by the city had afforded ample notice and full protection of property rights. Mr. Justice Brewer, in the opinion of the court, said:

> By one ordinance it (the city) ordered the construction of a sewer, and directed what area should be drained into that sewer, and created a taxing district out of that area. For these, no notice or assent by the taxpayer was necessary. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time, in proceedings of this nature, where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard. The ordinance named a place at which the viewers should meet, directed that they should hold the meetings at that place, and that all interested persons should be heard by them in the matter of making the estimate. The viewers, upon their appointment, gave notice by publication in the official paper of the city, of the time of their first meeting.
>
> It is settled that, if provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.
>
> We are of the opinion that notwithstanding the doubt arising from the lack of express provision for notice in the ordinance, it cannot be held in view of the notice that was given, or of the construction placed upon this ordinance by the council thereafter, and of the approval of the Supreme Court of the proceedings as in conformity with the laws of the state, that the provisions of the Federal Constitution requiring due process of law have been violated.

In *Village of Norwood v. Baker*,[99] however, a special assessment for opening a street was held invalid under the due process clause. Here the village attempted by ordinance to condemn and open a street to public use through a single tract of land in the village. The ordinance provided that the cost and expense of the condemnation, including the compensation paid to the owners, the cost of the proceedings, advertising

[99] (1898) 172 U. S. 269; 43 L. ed. 443. See also Field, R. H., 51 Cent. L. J. 243. (1900) Hubbard, Harry, "Special Assessments," 14 Harv. L. R. 1, 98.

interest on bonds, etc., should be assessed per front foot on the property abutting on the portion of the street condemned. A jury awarded the property owner $2,000 for the land taken. This was confirmed by the court and was paid to the owner. The council then passed an ordinance assessing the cost of the condemnation, $2,218.58, upon the abutting property, on a front foot basis. The effect of this ordinance was to charge the cost entirely against property owned by the same person to whom the damages had been paid. The Supreme Court, speaking through Mr. Justice Harlan, said:

> Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, and the legislature has a wide discretion in defining the territory to be specially benefited by a public improvement, which therefore may be subjected to special assessment to meet the cost of said improvement. But the power of the legislature in these matters is not unlimited. The principle underlying special assessments to meet the cost of public improvement is that the property on which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement.
>
> In our judgment the exaction from the owner of private property of the cost of public improvement in a substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation. We say substantial excess because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon abutting property without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required in the first instance to open the street at his own cost without compensation in respect of the land taken for the street. For by opening the street at his own cost he might save at least the expense attending formal proceedings of condemnation.

A reassessment by the city of Seattle for the cost of planking a street was upheld by the Supreme Court against an allegation of unfair burden on a particular piece of property.[100] As to reassessments, the court said:

> The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say,

[100] City of Seattle *v.* Kelleher (1904) 195 U. S. 351; 49 L. ed. 232.

> for a public work already done. . . . Nor can the plaintiff escape his liability on the ground that he purchased the property without notice of the fact that the improvement had not been paid for.

In *Gast Realty & Inv. Co. v. Schneider Granite Co.*[101] a provision of the charter of the city of St. Louis establishing a rule for the assessment of the cost of paving was held invalid under the Fourteenth Amendment. The charter provided that one-fourth of the total cost should be levied upon all the property fronting upon or adjoining the improvement, according to frontage, and three-fourths according to area upon all the property in a district established according to a rule set forth in the charter. This rule required the assessment of all platted property to its full depth and unplatted property one-half the distance to the next parallel street. The court said with reference to this rule:

> The legislature may create taxing districts to meet the expense of local improvement, and may fix the basis of taxation unless its action is palpably arbitrary or a plain abuse. . . . The city is shown by this case and others in the Missouri reports to contain tracts not yet cut into city lots, extending back from the streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit. The ordinance, following the charter, established a line not based upon any consideration of differences in the benefits conferred, but mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that ordinarily may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases.

In *Hancock v. City of Muskogee*[102] an injunction was sought against the enforcement of a city sewer assessment on the ground that the assessment was made without due process of law. The statutes authorized the city to establish sewer districts, and to cause district sewers to be constructed and to assess the cost against all pieces of ground in the district, in proportion to area, disregarding improvements and excluding public highways. It was contended that the procedure was void because no notice to the property owners was provided before the formation of the district, and because no notice was given of the plan for the sewer or the amount of the assessment.

[101] (1916) 240 U. S. 55; 60 L. ed. 523.
[102] (1919) 250 U. S. 454; 63 L. ed. 1081.

The Supreme Court, however, held the assessment valid. The whole legislative power of the state over the matter was held to have been delegated to the municipalities. Mr. Justice Pitney in delivering the opinion of the court, said:

> So far as the present ordinance determined that a district sewer should be constructed, and established the bounds of the district for the purpose of determining what property should be subjected to the special cost of constructing it, there was an authorized exercise of the legislative power of the state, which was not wanting in due process of law because of the mere fact that there was no previous notice to the property owners or opportunity to be heard.
>
> The question of distributing or apportioning the burden of the cost among the particular property owners is another matter. Decisions which have held that where the legislation, instead of determining for itself what lands shall be included in a district, or what lands will be benefited by the construction of a sewer, submits the question to some board, the inquiry thereby becoming judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included, have no application to a case where, as in the case before us, full legislative power over the subject matter has been conferred by the state upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general legislature.
>
> It is suggested further that the statutes are wanting in due process in that they afforded the property owner no opportunity to be heard as to the distribution of the cost of the sewer among the different properties in the district. It is sufficient to say that, as the legislature itself has prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area, there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation.

Certain Denver property owners objected to an assessment of their property for park purposes on the ground that the hearing provided for in the charter was before a mere committee of the council, which had no power to make any alteration in the assessments, but only power to recommend action to the council.[103] The Supreme Court intimated that it was not essential to due process that the board before whom the actual hearing is held have power to alter the assessment. But it based its decision upon the fact that the plaintiffs had not appeared before the tribunal which was provided and hence could not be heard to complain of the procedure.

[103] Farncomb *v.* City and County of Denver (1920) 252 U. S. 7; 64 L. ed. 424.

In *Carson v Sewer Commissioners of Brockton*,[104] Carson objected to the payment of an assessment for sewer maintenance upon the ground that the ordinance under which the assessment was made did not provide for notice of hearing to the property owners, and further, because he had paid for the installation of the sewer and felt that he should not be called upon to pay special tax for maintenance. He claimed that the assessment was contrary to the Fourteenth Amendment because it was not founded upon benefit to the property. The Supreme Court found itself unable to agree with his contentions. Mr. Justice Brown, who delivered the opinion of the court, said:

> The Supreme Court of Massachusetts held that the petitioner received a special benefit for the sewer for which he might be charged, and that the city, by building a sewer and receiving a part of its cost from the petitioner, did not bind itself that the sewer should be maintained forever, or that the petitioner should be at liberty to use it free of further expense.
>
> The validity of the legislative act is assailed on the ground that no notice was required to be given, and no provision made for a hearing in the changing of the rate of sewerage charges. There is no doubt that when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. Obviously these cases have no application to an ordinance which fixes beforehand the price to be paid for certain privileges, and leaves it optional with the taxpayer to avail himself of such privileges or not. Under the circumstances of this case no notice was necessary.
>
> Similar considerations apply to the defense that the petitioner has been, or is about to be, deprived of his property without due process of law. Of what property has he been deprived? There has not been, nor is there anything to indicate that there will be, any taking of his property within the meaning of the law. There is not even compulsory taxation of the property. The ordinance fixes the rentals. The lot owner could use the sewer or not as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing. There is no allegation in the petition that the petitioner was required by the board of health to discharge into the public sewer. There is no allegation that the particular charge as fixed by the commissioners was unreasonable, only that the method was unreasonable, that is, that any charge was unreasonable.
>
> The stress of the petitioner's argument seems to be laid upon the proposition that, his property having been once assessed for the construction of the common sewer, he has the right to the free use of such

[104] (1904) 182 U. S. 398; 45 L. ed. 1151.

sewer forever afterward, and that the expense of its maintenance must be raised by general taxation, and not by special assessment. This, however, is a question of state policy. It is for the legislature to say whether the construction of the sewer entitled the adjoining property owners to the free use of it, or only the right to a free entrance to it of their particular sewers. There can be no doubt that the adjoining property owners did receive a special benefit in being permitted to discharge their private sewers into it. We think the court was correct in holding in this case that the petitioner and other property owners whose lots abutted on this public sewer did receive a benefit not common to the inhabitants of the city generally, in being permitted to discharge into it the contents of their private sewers, that the amount of such benefit was determined by the city council, and that in its action there was nothing violative of the Federal Constitution.

Two final cases present special questions of taxation. The first, *Chadwick v. Kelley*,[105] involved an objection to an assessment for paving, under the Fourteenth Amendment, on the ground that the ordinance under which the work was done required the use only of residents of the city as laborers. The plaintiff claimed that this restriction was prejudicial to him in that by it the cost of the work might be increased.

The Supreme Court held this contention too far-fetched and uncertain to form the basis for judicial action. No such increased cost was shown or attempted to be shown by the evidence. Said the court:

> Possibly the effect of the ordinance in preferring the labor of resident citizens might tend to increase the cost of the work, but it might have the opposite effect by inducing outside laborers to become resident citizens, but such conjectural results are too remote and uncertain to furnish materials for judical determination.

In the last case under this head, the city of Jersey City had passed an ordinance making water rents a lien upon property, prior to a mortgage. The owner of a mortgage attacked the ordinance in a suit to foreclose his interest, on the ground that the ordinance deprived it of its property without due process of law.[106] Mr. Justice Bradley, speaking for the court, said:

> The Chancellor decided that the giving of a priority of lien to the water rents over the mortgages, pursuant to the statutes, did not deprive the complainant of his property without due process of law. And he decreed that, for the purpose of raising the money due on the premises,

[105] (1903) 187 U. S. 540; 47 L. ed. 293.

[106] Provident Institution for Savings *v.* Mayor, etc., of Jersey City (1885) 113 U. S. 506; 28 L. ed. 1102.

the mortgaged premises must be sold subject to such lien. The ground upon which the decision below was placed was that, the laws having made the water rents a charge on the land, with a lien prior to all other incumbrances in the same manner as taxes and assessments, the complainant took its mortgages subject to this condition, whether the water was introduced onto the lot mortgaged before or after the giving of the mortgage. We do not well see how this position can be successfully controverted. The origin of the city's right to priority of lien goes back to the year 1852. Although additional impositions were introduced in the revised charter of 1871, these are incidental regulations appropriate to the subject, and do not have the effect of impairing the plaintiff's property.

In what we have now said in relation to the anterior existence of the law of 1852 we do not mean to be understood as holding that the law would not also be valid as against mortgages created prior to its passage. Even if the water rents in question cannot be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them of priority of lien over all other incumbrances upon the property served with the water would be repugnant to the Constitution of the United States. The providing of a sufficient water supply for the inhabitants of a great and growing city is one of he highest functions of municipal government, and tends greatly to enhance the value of all real estate within its limits, and the charges for the use of its water may well be entitled to take high rank among outstanding claims against the property so benefited.

Summary and Conclusions

So far as municipal ordinances are concerned, the principal effect of the adoption of the Fourteenth Amendment was to transfer to the federal courts for final determination, as involving federal constitutional questions, matters which theretofore had been decided by the state courts as local questions under the common law. From earliest times in the legal history of municipal corporations they were restrained by common law rules from enacting bye-laws which were arbitrary, unreasonable, or discriminatory. Under present conditions the Supreme Court will not hold local legislation unconstitutional under the Fourteenth Amendment unless it is clearly arbitrary, unreasonable, or discriminatory in its terms or in its enforcement. Thus the Fourteenth Amendment has added little to the law of municipal corporations. It has resulted only in a transfer to the federal courts of the responsibility of acting as a final court of appeal in certain cases.

To be sure, this transfer of jurisdiction has undoubtedly resulted in greater uniformity in rules. For instead of forty-eight separate

judicial departments establishing diverse rules of common law we have a single federal judicial department establishing a uniform rule of constitutional law. In this, there is doubtless a gain.

The Fourteenth Amendment has frequently been used as the basis of attack in the federal courts against municipal legislation under the police power. In very few cases have these attacks been successful. Ordinances delegating absolute power to grant or refuse licenses to conduct certain types of business such as the sale of liquor or cigarettes or to conduct a billiard hall have been upheld. The court in such cases has pointed out that until the power so granted was used in an arbitrary or discriminatory manner no case could exist under the Fourteenth Amendment. But when such a case of unreasonable discrimination was brought to the attention of the court, it showed no hesitancy in declaring the ordinance, as administered, void.

The Supreme Court has also declined to interfere with the administration of a municipal ordinance upon the application of one who had not attempted to comply with its requirements, and who, consequently, could not have been harmed by it even if it were discriminatory in its terms. Only the victim of such discrimination can be heard to complain under the Fourteenth Amendment.

A city may make its consent a prerequisite to the exercise of any calling, otherwise lawful, which may be carried on in such a manner as to call for police regulation. Such are the peddling of merchandise, the sale of milk, the business of private detective, the use of public park property for the delivery of public addresses, the moving of buildings in the streets and into the fire limits, the storage of dangerous liquids, the conduct of public laundries, the sale of bread. It may not use its police powers, however, to establish unreasonable regulations such as fixing a harbor line at a point which would unnecessarily impair the value of private property.

Ordinances have been upheld as proper police regulations which prohibit the emission of dense smoke, interdict the burial of the dead within a city's limits, make vaccination compulsory, require that all houses should be connected with a sewer, provide for the summary destruction of unwholesome food, require milk sold in the city to be produced only from tuberculin tested cows, and provide for the disposal of all the garbage and refuse of a city.

The promotion of numerous objects of the police power through zoning regulations is of comparatively recent origin. Beginning with

ordinances restricting the keeping of private markets, dairies and cow stables, livery stables, and houses of prostitution to certain defined areas, the principle has been extended to what is now known as comprehensive zoning under which a city may establish, by a single ordinance, classes of propery use, and height and area of building which must be observed in all places within its jurisdiction.

The attempted use of this power to enforce a segregation of white and negro races in certain cities of the South has been held void as an arbitrary use of the police power which deprives persons of property without due process of law. Similarly, the arbitrary revocation of a permit to construct a building may be void under the due process clause.

Height restrictions were early recognized as a valid exercise of the police power. The prohibition of the use of property in a residential section for a brick kiln was also upheld. Finally, a comprehensive zoning ordinance was upheld during the 1926 term of court. The court pointed out, however, that each case of zoning must be decided upon its merits and that future enactments might not fare so well if discrimination was found to exist.

Building line restrictions requiring new structures to be set back a defined distance from the street are also valid. An early case on this point, however, held a building line restriction invalid because the committee which was to fix the line had been left no discretion, a petition of interested property owners deciding the question as to whether a line would be fixed or not. Although the Supreme Court in its later decisions has distinguished this case, it seems to the writer that the court rested its earlier decision on a precarious ground. There seems to be no reason why a federal court should enter into what was essentially a local question, to announce in effect that because legislative power had been delegated to the property owners in this case, the ordinance was void as depriving the property owner of his property without due process of law.

The restriction of the business of outdoor advertising has been recognized as valid by the courts. Not only may a city prohibit or tax the display of advertising upon vehicles upon the public streets, but it may also regulate the display of advertising upon boards located upon private property. By a dictum, the court suggests that the latter class might be prohibited altogether within residential districts. In one of these cases, a delegation of legislative power to property owners by the requirement of a petition was attacked under the authority of

the Eubank case, but the court upheld the ordinance, distinguishing the former decision.

Reasonable police regulations affecting public utility companies, including a requirement of the payment of a license fee, are uniformly upheld by the Supreme Court. Such a fee may not, under the police power, exceed the reasonably anticipated expenses of the municipality in enforcing the regulations imposed by the ordinances. The prohibition of the use of steam engines in the streets, switching across crowded crossings, and of the use of one-man trolley cars, and the requirement of the construction of viaducts, of the removal of switch tracks, of the lowering of a tunnel, that a street railway company should keep in repair the space between its rails, and even sprinkle it with water, have all been upheld. A street railway may be ordered to remove its tracks from the streets upon the expiration of a franchise, but its property may not be taken even though the franchise has expired. A city may not, in its private capacity, disturb the property of a public utility company, lawfully placed, merely to facilitate the construction of a similar utility by the public.

Rates fixed by municipal ordinance are frequently attacked as being confiscatory because they do not yield a fair return to the utility. In a few cases such contentions have been upheld, in others they have been denied, in still others, the confiscation was not so clear that the Supreme Court wished to act. This latter group resulted in permission to try out the established rates, with a right to bring action later if confiscation actually resulted. In some cases, confiscatory rates established by contract have been enforced.

Due process in general taxation does not demand an exact balance of burdens and benefits. But it does prevent taxes being laid for a private purpose. In license taxation, the classification adopted must bear some reasonable relationship to the object to be attained. In special assessments due process requires that there be a benefit to the property equal to the amount of the assessment and that the property owner shall be given a notice and an opportunity to be heard as to the amount of the charge to be levied against his property. If such notice is actually given, it is no objection to the validity of an assessment that the ordinances or charter fail to require notice. An arbitrary and unreasonable rule established by a municipal charter for special assessments will be held void. The board before which a hearing is held need not have actual power to alter the proposed assessment.

An assessment for sewer maintenance need not be based upon actual benefits. Payment for the construction of a sewer does not necessarily purchase the right to use it free of charge.

On the whole there is little to criticize in the opinions of the Supreme Court under the due process clause in so far as they deal with municipal ordinances. The strict attitude which can be discerned in the earlier cases seems to be giving way to a more liberal view of the police power needs of large cities. The present tendencies seem to afford little ground for a fear that the court will tend to make the due process clause an excuse for federal meddling in state and local affairs.

Chapter V

ORDINANCES UNDER OTHER CLAUSES OF THE CONSTITUTION

The great bulk of the cases decided by the United States Supreme Court affecting municipal ordinances falls within the field already surveyed in the three preceding chapters. Besides the commerce and contract clauses and the Fourteenth Amendment, however, there are a number of other portions of the Constitution itself with which municipal ordinances might conceivably come in conflict. In fact, any clause which places a limitation upon the powers of a state, might under certain circumstances be drawn into question in an ordinance controversy.

Among the clauses which might be thus involved are those contained in Article 1, Section 10, and those in the Thirteenth, Fifteenth, and Nineteenth Amendments. But inasmuch as practically this whole field is reserved to the Federal Government or to the states for legislation, and is seldom delegated to municipalities, ordinance questions are not likely to arise. Such clauses include: entering into treaties, alliances, and confederations, granting letters of marque or reprisal, coining money, emitting bills of credit, making anything but gold and silver coin legal tender in payment of debts, passing bills of attainder, *ex post facto* laws,[1] or granting titles of nobility. There are also several provisions which involve prohibitions except when action is authorized by Congress. These are in a similar category. They are: laying imports, except for executing inspection laws,[2] laying duties of tonnage,[3] entering into agreements or compacts with foreign states and engaging in war. Similarly, the prohibitions of the Thirteenth, Fifteenth, and Nineteenth Amendments are not likely to prove serious limitations upon

[1] For a case in which an ordinance was alleged to be an *ex post facto* law, see Locke *v.* City of New Orleans (1867) 4 Wall. 172; 18 L. ed. 334. The court held the law not even retrospective, and as it did not deal with a matter of criminal law or procedure it could not have been an *ex post facto* law within the meaning of the Constitution. Despite the confusion between the legal and popular meanings of *ex post facto*, the court has always adhered to the common law meaning of the term. See Calder *v.* Bull (1789) 3 Dall. 386 for leading principles.

[2] In one case, the levy of a municipal tax was alleged to constitute a duty upon imports. [Woodruff *v.* Parham (1869) 8 Wall. 123; 19 L. ed. 382.] But as the goods in question were moving in interstate and not in foreign commerce the clause was held inapplicable.

[3] There are some cases on this clause, see *infra.*

municipal ordinance power. The function of establishing suffrage qualifications is universally reserved to the state legislature under strict constitutional limits. Nor is it likely that any city would ever attempt by ordinance to legalize or countenance slavery or involuntary servitude except as a punishment for crime.

1. The Prohibition of Duties of Tonnage

The only cases which appear to involve any of these clauses, except as noted above, refer entirely to the prohibition of duties of tonnage. These have been alluded to above, as practically all of these cases also raise the point of interference with commerce.

The earliest case on this point was decided in 1867. A steamship company had been convicted of a violation of a statute imposing a tax upon every ship entering the port of New Orleans. The tax was to be collected by the port authorities.[4] The state sought to have the law upheld under the same principle as that applied to pilotage. But the court pointed out that the right to collect pilotage rested upon contract. Here the port authorities were to collect the tax whether they were called upon to perform any service or not. As to the character of this tax as a duty of tonnage the court said:

> We think . . . that the tax imposed by the Act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense, it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain duty on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not accomplish its intent. The general prohibition against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was, doubtless, intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. In this view of the case, the levy of the tax in question is expressly prohibited.

Thus the Supreme Court expanded the meaning of the tonnage tax clause to include all taxes upon vessels except as property. Under the doctrine of this case any state or municipal tax upon vessels for the privilege of entering or leaving a harbor, whether graduated according to tonnage or not, is void.

[4] Southern Steamship Co. *v.* Master etc. of Port of New Orleans (1867) 6 Wall. 31; 18 L. ed. 749.

This is illustrated by the next case which also involved an ordinance of the city of New Orleans. This ordinance purported to levy wharf dues upon all steamboats which should moor or land in the Port of New Orleans. The tax was at the rate of ten cents per ton. It was urged by the city in defense of an action to restrain the collection of the sums so levied that the charge was only compensation for the use of wharves owned by the city.[5]

The court, after considering the evidence came to the conclusion that the tax was a duty of tonnage. It was shown that the ordinance covered landing at any place within the city limits. It applied to more than twenty miles of the levee and banks of the Mississippi within the city limits, not more than one-tenth of which was provided with wharf accommodations. The court said:

> The tax is, therefore, collectible for vessels which land at any point on the banks of the river without regard to the existence of wharves. The tax is also the same where the vessel is moored in any part of the port whether it ties up to a wharf or not, or is located at the shore or in the middle of the river. Such a tax cannot be treated as compensation for the use of a wharf. In view of the fact that the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely, "that no state shall without the consent of Congress lay any duty of tonnage."
>
> In saying this, we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a harbor or pier owned by an individual or by a municipality or other corporation just compensation for the use of such property. Nor do we see any reason why, when a city or other municipality is the owner of such structures, it should not be allowed to exact and receive this reasonable compensation as well as individuals. If hardships arise in the enforcement of the principles laid down in this case and the just necessities of local commerce require a tax such as is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its consent required. This is a much wiser course, and Congress is a much safer depository of the final exercise of this important power than the ill-regulated and overtaxed towns and cities which are not likely to look much beyond their own needs and their own interests.

Such a case of proper charge for the use of wharf accommodations by vessels is presented in the next case. The city of Keokuk, Iowa, owned a public wharf which had been constructed and maintained at public expense. A charge was established by ordinance for the use of

[5] Cannon *v.* New Orleans (1874) 20 Wall. 577; 22 L. ed. 417.

its facilities. A vessel owner objected on the ground that this charge was a duty of tonnage.[6]

The court, however, upheld the ordinance saying, "A charge for services rendered or for conveniences provided is in no sense a tax or duty." It was suggested, however, that if the charges were not reasonable they might be held invalid as veiled tonnage duties. Such was not the case here.

Under the authority of the Keokuk case, the Supreme Court upheld the validity of similar ordinances of the cities of St. Louis;[7] Vicksburg, Mississippi;[8] Catlettsburg, Kentucky;[9] Parkersburg, West Virginia;[10] and New Orleans,[11] against the objection that they were tonnage taxes because of their alleged unreasonable and extortionate rates. The Supreme Court declined to enter into the question of the reasonableness of the rates holding that to be one for the state courts.

In *Wiggins Ferry Co. v. City of East St. Louis*[12] the company alleged that a license tax upon its ferry boats was a duty of tonnage, but the Supreme Court rejected the contention with the remark that it could not be a tonnage tax "as it is levied upon the keeper and not the boat."

2. Implied Limitations Upon Municipal Action

There are, besides the express limitations imposed by the Constitution upon the states, certain implied limitations arising out of the nature of our federal system. It was decided early that a state could not by its power of taxation embarrass or hinder the operations of the general government.[13] This implied limitation upon state action is equally applicable to municipal action—as the municipality is for purposes of constitutional inquiry only an agent of the state.

This is shown by a few cases. In 1829 the Supreme Court decided that a city could not by ordinance levy a tax for city purposes upon stock

[6] Keokuk Northern Line Packet Co. *v.* City of Keokuk (1877) 95 U. S. 80; 24 L. ed. 377.

[7] Northwestern Union Packet Co. *v.* City of St. Louis (1880) 100 U. S. 423; 25 L. ed. 688.

[8] Mayor, etc. of Vicksburg *v.* Tobin (1880) 100 U. S. 430; 25 L. ed. 690.

[9] Cincinnati, etc. Packet Co. *v.* Board, etc. of Catlettsburg (1882) 105 U. S. 559; 26 L. ed. 1169.

[10] Parkersburg etc. Co. *v.* City of Parkersburg (1883) 107 U. S. 691; 27 L. ed. 584.

[11] Ouachita etc. Co. *v.* Aiken (1887) 121 U. S. 444; 30 L. ed. 976.

[12] (1883) 107 U. S. 365; 27 L. ed. 419.

[13] McCulloch *v.* Maryland (1819) 4 Wheat. 316. 4 L. ed. 579.

(bonds) of the United States Government.[14] In 1849 the court held that a city could not open a street through a military reservation without the consent of Congress.[15] Eleven years later it held that an ordinance of the legislative body of the District of Columbia could not be availed of to defeat a tax title derived from a sale made under an Act of Congress.[16]

A unique situation was presented in the case of *State of Georgia v. City of Chattanooga*.[17] The state had in 1837 constructed a railroad from the city of Chattanooga in Tennessee to Atlanta in Georgia. Land was secured by the state in the city of Chattanooga upon which to locate its terminal and yards. This land, although on the outskirts of the city when originally purchased, had been surrounded by the city and there was a demand for the opening of an important business street across the tract. Condemnation proceedings were begun by the city in the Tennessee courts to acquire the needed land for street purposes. The state of Georgia thereupon brought an original action in the Supreme Court of the United States to restrain the city from further proceedings under the condemnation ordinance. The state alleged that the city had no power to make the condemnation because the land was already dedicated to a public use and because the state had never consented to be sued in the state courts of Tennessee. The Supreme Court, in its opinion, which was delivered by Mr. Justice Butler, said:

> The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. Land acquired by one state in another state is held subject to the laws of the latter, and to all the incidents of private ownership.
>
> The power of the city to condemn does not depend upon the consent or suability of the owner. The lack of opportunity to be heard before the passage of the ordinance opening the street furnishes no ground for complaint. The taking is a legislative, and not a judicial, function, and an opportunity to be heard in advance need not be given. Personal notice is not essential. Public notice is sufficient. It appears on the face of the bill, that, if it so elects, Georgia has a plain, adequate, and complete remedy in the condemnation proceedings instituted by the city.

[14] Weston *v.* City of Charleston (1829) 2 Pet. 449; 7 L. ed. 481.
[15] U. S. *v.* City of Chicago (1849) 7 How. 185; 12 L. ed. 660.
[16] Thompson *v.* Roe (1860) 22 How. 422; 16 L. ed. 387.
[17] (1924) 264 U. S. 472; 68 L. ed. 796.

3. Ordinances in Conflict with Treaties and Statutes

It will be recalled that the supremacy of Federal law declared in Article 6 of the Constitution extends to treaties and statutes as well as to the constitutional text itself. Thus far in this study it has been necessary to refer only to express or implied constitutional provisions. We will now examine the few cases dealing with statutes and treaties.

Only one case has been found in which the decision has rested upon the ground that municipal ordinance was repugnant to an Act of Congress. That was *Merchants' National Bank v. City of Richmond.*[18] Here the city attempted, by ordinance, to levy a tax for city purposes upon national and state bank stock at a higher rate than upon other moneyed capital. The state courts, interpreting the Act of Congress prohibiting discrimination in the taxation of national bank stock, assumed that the intent of the act was merely to equalize competition with state banks. But the Supreme Court took judicial notice of the fact that private capital entered into similar competition with national banks and said:

> In our opinion the state court has taken too narrow a view of the section, in which there is an express provision that the tax shall not exceed the rate imposed upon other moneyed capital in the hands of individual citizens of the state. By repeated decisions of the court it has become established that while the words 'money capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with the banks. The include not only moneys invested in private banking, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking. In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of the plaintiff in error was assessed exceeded the limitation prescribed by the statute, and hence that the tax is invalid.

The ordinance cases in which treaties were alleged to have been violated are three in number. The first was reviewed above under the commerce clause. A Canadian ferry company claimed that an ordinance of the city of Sault Ste. Marie, Michigan, imposing a license tax upon its business, was a violation of the commerce clause and of a treaty between Great Britain and the United States. The court, however,

[18] (1921) 256 U. S. 635; 65 L. ed. 1135.

decided the case upon the basis of the repugnance of the ordinance to the commerce clause and declined to consider the question raised with reference to the treaty.[19]

The other two cases have been decided upon the treaty point. The first of these involved the validity of an ordinance of the city of Seattle, Washington, which denied pawnbrokers' licenses to aliens. A Japanese pawnbroker brought action to restrain the enforcement of the ordinance alleging its repugnance to a treaty between the United States and Japan.[20] The Supreme Court said:

> The plaintiff in error invokes and relies upon the provision that the citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, and to lease land, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.
>
> A treaty made under the authority of the United States is the supreme law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend so far as to authorize what the Constitution forbids, it does extend to all proper subjects of negotiation between our government and other nations. The treaty is binding within the state of Washington. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It operates of itself, without the aid of any legislation, state or national, and it will be applied and given authoritative effect by the courts.
>
> The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker, but it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that the plaintiff in error, in violation of the treaty, is denied equal opportunity.
>
> It remains to be considered whether the business of pawnbroker is "trade" within the meaning of the treaty. By definition of the ordinance, pawnbrokers are regarded as carrying on a business. While regulation has been found necessary in the public interest, the business is not, on that account, to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business

[19] City of Sault Ste. Marie *v.* International Transit Co. (1914) 234 U. S. 333; 58 L. ed. 1337.

[20] Asakura *v.* Seattle (1924) 265 U. S. 332; 68 L. ed. 1041.

are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the treaty, and it must be held that such business is trade within the meaning of the treaty. The ordinance violates the treaty.

In *Ohio ex rel. Clarke v. Deckebach*,[21] a subject of the King of England, who had been denied a license to keep a pool and billiard hall, under an ordinance excluding aliens from such business, sought mandamus to compel the issuance of the license. The defendant, city auditor of the city of Cincinnati, in his answer asserted that "Billiard and pool rooms in the city of Cincinnati are meeting places of idle and vicious persons; that they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; that numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native-born and naturalized citizens; that the maintenance of billiard and poolrooms by them is a menace to society and to the public welfare; and that the ordinance is a reasonable police regulation passed in the interest and of and for the benefit of the public."

The Supreme Court said:

> The application of the treaty to the present case requires but brief consideration. As stated in the title its purpose is "to regulate the commerce" between the two countries. . . . It guarantees "reciprocal liberty of commerce" between the territories of the signatories. The privileges secured by it to the inhabitants of the two countries, so far as relevant to the present controversy, pertain to and are intended to facilitate commerce. The clause suggested as pertinent reads: "and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce."
>
> Even if assumed, as argued, that the proprietor of a pool room may for some purposes be regarded as engaged in a trade, the word being used as synonymous with occupation or employment, he does not engage in commerce within the meaning of a treaty which merely extends to "merchants and traders" "protection and security for their commerce." It would be an extravagant application of the language quoted to say that it could be extended to include the owner of a place of amusement who does not necessarily buy, sell or exchange merchandise or otherwise participate in commerce.
>
> The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, it does not follow that alien

[21] (1927) 274 U. S. 392; 47 Sup. Ct. Rep. 630. 71 L. ed. 1115.

race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences, and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies. It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment, and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong.

4. Nature of Federal Bill of Rights

On occasion attempts have been made to attack the validity of municipal ordinances under the provisions of one or more of the first eight amendments to the Federal Constitution. Such attempts always are unavailing, as the Supreme Court held early in its history that these amendments applied only to the Federal Government and not to the states or to their municipalities.[22] Thus a municipal ordinance may deny freedom of speech or of the press, deny religious liberty, or the right to bear arms, etc., without raising any federal question. The Fifth Amendment, before the passage of the Fourteenth Amendment, was the principal one upon which reliance was placed in such cases.

But it is true that the states have in their own constitutions made provisions for the protection of individuals against such oppressive acts. It is to the state courts, then, and state constitutions that the citizen normally must look for protection against the municipality.

One example will be cited. In 1842 the city of New Orleans passed an ordinance forbidding the exposure of corpses in any church and requiring that all funerals be held in the obituary chapel. A priest was fined for a violation of the ordinance and he appealed to the Supreme Court, alleging that the ordinance was a denial of religious liberty contrary to the First Amendment.[23] The court pointed out that the Constitution made no provision for protecting the citizens of the various states in their religious liberties; this being left to the state constitutions and laws. Hence the writ was dismissed for want of jurisdiction.

[22] Barron *v.* Baltimore (1833) 7 Pet. 243; 8 L. ed. 672.

[23] Permoli *v.* Municipality No. 1 (1845) 3 How. 589; 11 L. ed. 739.

Summary and Conclusions

Federal constitutional limitations upon the power of municipalities are both express and implied. All of the clauses of the Constitution which limit the power of the states to pass laws are equally applicable to municipal ordinances. Theoretically ordinance cases might arise under any clause which limits state action. Practically, however, most of the decided cases have involved the commerce, contract, and due process clauses. A few cases have involved the conditional prohibition against tonnage taxes.

Any imposition of a tax upon a vessel for the privilege of entering, mooring, or discharging its cargo in a port, whether measured by the carrying capacity of the vessel or not, is a duty of tonnage and is prohibited except with the consent of Congress. The court has construed this clause as a prohibition upon the power of the states to use the taxing power to interfere with or impede the free flow of commerce. However, if the charge is reasonable and is imposed as compensation for the use of wharf facilities which have been provided at public expense, it is valid. It is no objection to the amount of such wharfage dues that they exceed the cost of construction and maintenance of the facilities. In the last analysis the question of reasonableness is one for the state courts. The Supreme Court has implied that it would interfere only when the rates were so unreasonably high as to be clearly a veiled attempt to burden interstate or foreign commerce.

No municipality may, any more than a state, interfere with any of the operations of the Federal Government through the exercise of any governmental power. But a state which owns property in another state in its proprietary capacity cannot claim such a sovereign immunity as would exempt it from the exercise of eminent domain over its property by the state in which the property lies.

Municipal ordinances may be void as in conflict with treaties as well as with federal statutes and the Federal Constitution. A city may not exclude aliens from a lawful occupation when their right to engage in the business is protected by a treaty. However, it appears that if there is a reasonable relationship between the character of the business prohibited and the greater tendency of foreigners to violate the law when engaging in it, such a business may be closed to aliens unless there is an express treaty stipulation to the contrary. This latter rule has been applied only to the business of conducting a billiard hall,

a business which has been recognized by the Supreme Court as one which may be prohibited under the police power.[24]

The reported cases disclose several attempts to have ordinances declared invalid under one or another clause of the bill of rights of the Federal Constitution. The court, in such cases, has always pointed out that the first eight amendments do not restrict the acts of the states, and hence of their municipalities.

[24] See Murphy *v.* Peo. (1912) 225 U. S. 623; 56 L. ed. 1229.

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